

**MOVING FROM ‘CENTRAL EXCLUSIVITY’ TO COOPERATIVE
FEDERALISM IN THE INTERNATIONAL ECONOMIC PARTICIPATION
OF FEDERAL SYSTEMS: A CASE STUDY OF NIGERIA**

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by

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ABSTRACT

Conventionally, the conduct of foreign relations (including international economic relations) by nation-states has been the exclusive preserve of the central tier of government (i.e. 'central exclusivity' in foreign relations). However, the peculiarities of federal systems have posed a serious challenge to this conventional position. This is because federalism is based on principles which require shared powers between multiple levels of government. As such, Sub-Federal Governments (SFGs) have been known to affect the operation of international norms in federal systems.

Furthermore, the international system is constantly evolving due to geopolitical changes, most notably globalisation. These changes in the international system have facilitated an increased participation of SFGs in international relations and as a consequence brought into question the continued relevance of conventional norms pertaining to foreign relations in international law.

With regards to Nigeria, and in the specific context of international economic relations, empirical evidence shows that since the start of the 4th democratic Republic in 1999, SFGs in Nigeria are increasingly accessing international markets and engaging in activities which have direct and/or indirect impact on Nigeria's international economic relations. This trend contradicts the constitutional position in Nigeria, where the extant theoretical framework underpinning Nigeria's international economic participation gives plenary powers for foreign relations to the Federal Government (FG). In light of this contradiction, this thesis examines the divergence between theory and reality in Nigeria's international economic relations.

This thesis puts forward a proposition that the functional reality of international economic interactions in the current dispensation necessitates a re-assessment of the existing framework underpinning the relationship between domestic (federal) and international regimes in international economic relations. In the context of Nigeria, this thesis concludes that the changing dynamics of international economic relations necessitates a shift from central exclusivity to a cooperative federalism model.

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ADB	African Development Bank
AGOA	African Growth and Opportunity Act
ATPC	African Trade Policy Centre
BC	Before Christ
BDIC	Bayelsa Development and Investment Corporation
BPE	Bureau for Public Enterprise
CAC	Corporate Affairs Commission Nigeria
CAMA	Companies and Allied Matters Act Nigeria
CBN	Central Bank of Nigeria
CCTN	Canadian Coordinator for Trade Negotiations
CFA	Committee on Foreign Affairs Nigerian National Assembly
CUFTA	Canada-US Free Trade Agreement
CFTA	Committee for the Free Trade Agreement
CIDA	Canadian International Development Agency
CNAFTN	Committee for North American Free Trade Negotiations
CPCS	Canadian Pacific Consultant Services
CTRADE	Canada Federal-Provincial- Territorial Trade Committee
CTTC	Canadian Trade and Tariffs Committee
CU	Custom Union
DFID	Department for International Development UK
DMO	Debt Management Office Nigeria
ECOWAS	Economic Community for West African States
ENFP	Enlarged National Focal Point Committee on Multilateralism and Regional Trade Matters Nigeria
EU	European Union
ACP	African, Caribbean and Pacific Group of States
FDI	Foreign Direct Investment
FEC	Federal Executive Council
FG	Federal Government
NFMC	Nigerian Federal Ministry of Commerce

NFMF	Nigerian Federal Ministry of Finance
NFMI	Nigerian Federal Ministry of Industries
NFMST	Nigerian Federal Ministry of Science and Technology
NFMTC	Nigerian Federal Ministry for Trade and Commerce
NFM TI	Nigerian Federal Ministry of Trade and Investment
FPCD	Federal Provincial Coordination Division
NFPIS	Nigerian Federal Produce Inspection Service
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalised Scheme of Preferences
GSTP	General System of Trade Preferences
ICFP	Inter-ministerial Committee on Foreign Policy Belgium
ICSID	International Centre for Settlement of Investment Disputes
IFC	International Finance Corporation
IGPAC	Intergovernmental Policy Advisory Committee US
IMF	International Monetary Fund
ITO	International Trade Organisation
JICA	Japanese International Corporation
JSEPA	Japan-Singapore FTA
MAN	Manufacturers Association of Nigeria
MFN	Most Favoured Nation
MOCs	Multinational Oil Corporations
MOST	Management of Social Transformations
NACCIMA	Nigerian Association of Chambers, Industry, Mines and Agriculture
NAFDAC	National Agency for Food and Drug Administration and Control
NAFTA	North American Free Trade Agreement
NASSI	Nigerian Association of Small Scale Industry
NCC	National Council on Commerce Nigeria
NCS	National Council of State Nigeria
NCS	Nigeria Customs Service

NCSL	National Conference of State Legislatures US
NEC	National Economic Council Nigeria
NEEDS	National Empowerment and Economic Development Strategy Nigeria
NEPC	Nigerian Export Promotion Council
NEPZA	Nigerian Export Processing Zones Authority
NGA	National Governors Association US
NGF	Nigerian Governor's Forum
NIIMP	National Integrated Infrastructural Master Plan Nigeria
NIPC	Nigerian Investment Promotion Commission
NSDS	National Sustainable Development Strategies
NSE	Nigeria Stock Exchange
NT	National Treatment
NTBs	Non-Tariff Barriers
NTPD	Nigerian Trade Policy Document
OECD	Organisation for Economic Co-operation and Development
OMC	Open Methods of Coordination
OPEC	Organization of the Petroleum Exporting Countries
OPS	Organised Private Sector Nigeria
OSIC	One Stop Investment Centre Nigeria
POGG	Peace, Order and Good Government Clause Canada
RoO	Rules of Origin
RTA	Regional Trade Agreement
SA	South Africa
SAA	Statement of Administrative Action for the Uruguay Round Trade Agreements US
SCM	Subsidies and Countervailing Measures
SEA	Single European Act
SEEDS	State Economic Empowerment and Development Strategies Nigeria
SFGs	Sub-Federal Governments
SLP	San Luis Potosi
SMC	Supreme Military Council Nigeria

SON	Standard Organisation of Nigeria
SPARC	State Partnership for Accountability, Responsiveness and Capability
SPRM	State Peer Review Mechanism
SWOT	Strengths, Opportunities, Weaknesses and Threats
TBI	Trade Barrier Instrument
TPRM	Trade Policy Review Mechanism
TRIPS	Trade - Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESO	United Nations Educational, Scientific and Cultural Organization
US	United States of America
USID	United State Agency for International Development
USTR	US Trade Representative Office
WTO	World Trade Organisation

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O Omiunu, Liverpool 2014

PREFACE

The law is stated up to May 2014.

Chapter One: General Introduction.

1.1 Federalism and Foreign Relations.

For over a century, there has been controversy over the relationship between federalism and foreign relations.¹ Conventionally, foreign relations are regarded as an area which necessitates singleness of purpose, while federalism as a system of government is premised on the concept of shared and/or divided competences among multiple levels of government.² As a consequence of this divergence in the conceptualisation of foreign relations and federalism, a federal system is faced with challenges when allocating foreign affairs competences in its constitution. A major issue considered is whether foreign relations competence should be entirely borne by the central government or divided between the central government and federating units.³

A number of theoretical positions address this constitutional challenge identified above. There is the orthodox view which situates foreign affairs powers exclusively with the central government. For the purpose of this investigation this orthodox view will be termed ‘central exclusivity.’⁴ ‘Central exclusivity’ is a constitutional arrangement where the central level of government in a federal system has plenary powers i.e. exclusive jurisdiction on matters of foreign policy.⁵ Central exclusivity is found in the foreign

¹ See Ivan Bernier, *International Legal Aspects of Federalism* (Longman 1973) 1-6; KC Wheare, *Federal Government* (4th ed OUP 1963) 183- 186.

² Bernier (n 1) 10-11; Ben Nwabueze, *The Presidential Constitution of Nigeria* (Hurst & Company 1982) 37.

³ See RA Akindede and Oyeleye Oyediran, ‘Federalism and Foreign Policy in Nigeria’ (1985) 41 Intl J 600, 602; Matthew S Mingus, ‘Transnationalism and Sub-National Paradiplomacy: Are Governance Networks Perforating Sovereignty?’ (2006) 29 (8) Intl J Public Admin 577, 578.

⁴ This terminology has been adopted from the work of Spiro. See Peter J Spiro, ‘Federalism and Immigration: Models and Trends’ (2001) 53 (167) Intl Soc Sci J 67, 71. This concept is also referred to as ‘foreign affairs exceptionalism.’ See Matthew Schafer ‘Federal States in the Broader World’ (2001) 27 CAN-US LJ 35, 36.

⁵ Spiro (2001) (n 4) 71.

affairs regime of most nation-states (cutting across different systems of government) in the international system. In this thesis, the focus will be on central exclusivity in the context of a federal system. Using the US as an example, it will be argued in the course of this thesis how and why a system can be classified as central exclusive. Also the foreign affairs system in Nigeria will be examined to ascertain if the extant system for international economic relations is central exclusive. Proponents of this school argue that shared foreign affairs competence between a central government and sub-federal governments (SFGs) has the potential to undermine the credibility of the nation-state in international circles.⁶

Alternate theoretical viewpoints to central exclusivity can be broadly categorised as 'revisionist.'⁷ Revisionism encompasses theories which seek to modify previously accepted norms or historical accounts.⁸ In the context of foreign affairs federalism, revisionist scholars question the conventional norm of central exclusivity in international relations. They instead advocate shared (concurrent) competence between central governments and SFGs on matters of foreign policy.⁹ Spiro,¹⁰ a leading proponent of the

⁶ *Holmes v. Jennison* 39 US 570 (1840) para 557; Edward T Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (2004) 25(1) *Nw J Intl L & Bus* 1, 20; Schafer (n 4) 37-39.

⁷ The concept of revisionism originated from the writings of Eduard Bernstein in the 19th century. See Eduard Bernstein, '*Der Revisionismus in der Sozialdemokratie*' Translated from German to English by Henry Tudor and JM Tudor (eds), *Marxism and Social Democracy: The Revisionist Debate 1896-1898* (CUP 1988). Revisionism was a reference to Bernstein's challenge of the conventional Marxism doctrines in relation to capitalism. '... [I]t was based not just on the perspective of an individual but on an emerging body of opinion linked to a movement that split from orthodox Marxism.' Sebastian Balfour, 'The Concept of Historical Revisionism: Spain since the 1930s' (2008) 21 (3) *Intl J Iberian Stud* 179, 181. Subsequently, this concept has been utilised as an umbrella term for any critical re-examination of conventional theories and historical accounts of world affairs. For in-depth discussions on the origin, scope and application of revisionism see generally, David W Morgan, 'The Father of Revisionism Revisited: Eduard Bernstein' (1979) 51 (3) *JMH* 525; Sheila Fitzpatrick, 'Revisionism in Retrospect: A Personal View' (2008) 67 (3) *Slavic Review* 682.

⁸ Balfour (n 7) 181-183; Schafer (n 6) 36.

⁹ See generally, Peter J Spiro, 'Foreign Relations Federalism' (1999) 70 *U Colo L Rev* 1223; Jack L Goldsmith, 'Federal Courts, Foreign Affairs and Federalism' (1997) 83 (8) *Va L Rev* 1617; Curtis A Bradley, 'A New American Foreign Affairs Law?' (1999) 70 *U Colo L Rev* 1089.

¹⁰ Spiro (1999) (n 9).

revisionist school of foreign affairs federalism, argued that ‘...making states [in the US] directly accountable to the international community ...would likely further the incorporation of international law in the United States.’¹¹ Goldsmith (also speaking in the context of the US) argued that the enumerated provisions giving foreign relation powers to the US federal government does not ‘impose new limitations on the states or purport to bar states from participating in all foreign relations-related functions.’¹²

Situated mid-way between central exclusivity and pure revisionism is the theory of cooperative federalism.¹³ Cooperative federalism entails a process of federal relations where different levels of government work together as complementary parts in a shared legal sphere.¹⁴ This could mean joint participation by each level of government in the formation and/or implementation of policies; which is achieved either through formal or informal channels.¹⁵ Although cooperative federalism seeks revision of the conventional norm, it can be distinguished from mainstream revisionist theories. This is because cooperative federalism seeks the integration of relevant actors into an existing framework, rather than advocating the operation of a parallel framework for such actors. In essence, core foreign affairs revisionists seek **concurrent** competence, while cooperative federalists seek **complementary** competence.

From the preliminary observations above, it is argued that the validity of these theoretical perspectives is significantly tied to changing geo-political patterns of the international system and historical antecedents of the federalism process. Revisionists such as Spiro,¹⁶ Goldsmith,¹⁷ Bradley¹⁸ and Conlan and others¹⁹ rely on changes in the

¹¹ *ibid* 1225 - 1226.

¹² Goldsmith (n 9) 1643 - 1644

¹³ Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009)116.

¹⁴ *ibid* 347. See also Christopher K Bader, ‘A Dynamic Defense of Cooperative Federalism’ (2014) 35 Whittier L Rev (Forthcoming) 4 <<http://dx.doi.org/10.2139/ssrn.2189920>> accessed 31 July 2013.

¹⁵ *infra* Chapter five, section 5.4.

¹⁶ Spiro (1999) (n 11) 1267.

¹⁷ Goldsmith (n 12) 1644.

geopolitical circumstances of international relations as a basis for their claims that SFGs should be allowed to participate in international relations. Conversely, central exclusivists such as Schafer argue against the participation of US SFGs in foreign policy on the premise that a dormant foreign affairs doctrine in favour of the central government in the US is supported by historical antecedents in the constitutional development of the US which made it imperative for the central government to exercise plenary foreign affairs powers.²⁰ Finally, cooperative federalists such as Bader argue that a cooperative approach to international relations is a compromise which has evolved as a practical and flexible response to the changing geo-political patterns in the international system.²¹

In view of the emphasis identified above, it is pertinent to explain the significance of changing geopolitical circumstances to the conceptualisation of foreign relations in federal systems. Specifically, globalisation is identified in this thesis as a key facilitator of these changes referred to. Globalisation has re-shaped the dynamics of international relations, especially as it pertains to the concept of sovereignty and accepted practices of international law in the 21st century.²² For example, globalisation has led to an increase in the structural differentiation of goods and assets which has spread across traditional political borders and economic sectors.²³ This in turn has resulted in transnational and multinational changes, which have a major impact on outcomes in the determination of

¹⁸ Bradley (n 9) 1105.

¹⁹ Timothy J Conlan and others, 'Taking on the World: The International Activities of American State Legislatures' (2004) 34 (3) *Publius* 183.

²⁰ Schafer (n 8) 41.

²¹ Bader (n 14) 6.

²² See Hayes (n 6) 20. See also Guy Lachapelle and Stéphane Paquin (eds), *Mastering Globalisation: New Sub-States' Governance and Strategies* (Routledge 2005); JH Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97 *Am J Intl L* 782; Peter Van Den Bossche, *The law and Policy of the World Trade Organisation* (2nd edn, CUP 2008).

²³ See UNESCO Management of Social Transformations (MOST) Phase I Globalisation Study <<http://www.unesco.org/most/globalisation/Introduction.htm>> accessed 01 September 2013.

subject matters (such as environment, trade and world regulation).²⁴ Another noticeable impact of globalisation on international relations is in the area of governance structures.²⁵ Globalisation has challenged the sovereignty status quo of Westphalian statehood by disaggregating traditional governance structures and encouraging the emergence of new ones (global and sub-national).²⁶ As a consequence, the suitability of conventional sovereignty based theories underpinning the interaction between federal systems and international norms is now questionable.²⁷

1.1.1 The Relationship between Federalism and International Economic Relations.

The observations above apply to the conduct of international economic relations. Like other aspects of international relations, the conduct of international economic relations in the Westphalian era of Statehood, has been conventionally situated within the exclusive competency of central governments in most federal systems.²⁸ However, due to changing dynamics brought about by globalisation it is arguable that a new dispensation of international economic relations has emerged. This new dispensation has found expression in a fluctuating relationship between multilateralism and regionalism which are the two principal international platforms for the regulation of international trade.²⁹

²⁴ Michael Keating, 'Regions and International Affairs: Motives, Opportunities and Strategies' (1999) 9(1) Reg & Fed Stud 1.

²⁵ Anne-Marie Slaughter, 'The Real New World Order' (1997) 76 (5) Foreign Affairs 183, 184; Jessica Matthews, 'Power Shift' (1997) 76 (1) Foreign Affairs 50.

²⁶ Slaughter (n 25).

²⁷ Jackson (2003) (n 22); Hayes (n 22).

²⁸ Bernier (n 2) 1- 6; Hayes (n 27) 20.

²⁹ See Klaus Armingeon and others, 'The Constitutionalisation of International Trade Law' in Thomas Cottier and Panagiotis Delimatsis (eds), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (CUP 2011) 69-102.

Historically, regionalism was first in time as a recognised platform for the participation of nation-states in international trade.³⁰ However, with the introduction of the multilateral trade system in the aftermath of the Second World War, regionalism was subsumed under the rubric of the multilateral system by virtue of art XXIV GATT 1947. Interestingly, since the early 1990s, regionalism has re-emerged as a contending trade policy platform of choice amongst most trading nations of the world.³¹ This has led to growing concerns on how this shift within the exogenous interaction of the international trade regulatory regimes impacts on the participation of federal systems in international economic relations.³²

In this thesis, the impact of globalisation, leading to the aforementioned changes in the dynamics of the international economic system is viewed as basis for the new dispensation of international economic interactions. From this perspective, the new dispensation is characterised by an expansion of multilateralism into spheres hitherto within the exclusive competence of national governments and the resurgence of a new wave of regionalism which is dynamic in nature and expansive in scope.³³ More specifically, the focus in this thesis is on the ‘contraction’ effect which has been brought about by the expansion of international norms.³⁴ Due to globalisation, international economic interaction has become more localised in terms of its scope and actors.³⁵ This

³⁰ See WTO 2011 Report, *The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (WTO Publications 2011) 49; Frederick M Abbott, ‘A New Dominant Trade Species Emerges: Is Bilateralism a Threat?’ [2007] JIEL 571, 572.

³¹ According to the WTO as of 15 May 2011, some 489 RTAs, counting goods and services notifications separately, have been notified to the GATT/WTO. Of these, 358 RTAs were notified under art XXIV of the GATT 1947 or GATT 1994; 36 under the Enabling Clause; and 95 under art V of the GATS. As at that same date, 297 agreements were in force. See AL Stoler, ‘Preferential Trade Agreements and the Role and Goals of the World Trade Organization’ (Conference on Free Trade Agreements in the Asia-Pacific Region: Implications for Australia, Perth, July 2004).

³² Hayes (n 28) 1.

³³ See generally Christopher J Kukucha, *The Provinces and Canadian Foreign Trade Policy* (UBC Press 2008); Keating (n 24) 1.

³⁴ ‘Contraction effect’ is used in the context of shrinking foreign affairs powers of central governments in federal systems, due to the intrusiveness of the expanding scope of international economic regimes.

³⁵ Emily Chiang, ‘Think Locally, Act Globally? Dormant Federal Common Law Pre-emption of State and Local Activities Affecting Foreign Affairs’ (2003) 53 Syracuse L Rev 923, 924-25. See also Matthew

is because globalisation affords opportunities for new actors (SFGs and non-state actors) to engage in cross-border economic interactions.³⁶

In light of the changes in the international economic system, the orthodox constitutional doctrine of central exclusivity in international relations has increasingly come under scrutiny. Hayes argues that the dynamics of a new international economic system reshaped by globalisation requires: ‘...a more universal concept than the traditional parochial notion of sovereignty.’³⁷ Realising that there is a change in the protocol for interacting in the international economic system, a number of federal systems including Canada, Belgium, India, Argentina and the US out of necessity and/or pragmatism are adapting to the emerging changes, albeit to varying degrees.³⁸ However, this theoretical shift is still not a universally accepted position in all federal systems. For example, the focus in this thesis is to ascertain if the system for international economic relations in Nigeria (the selected case study of this thesis) still aligns with the status quo of central exclusivity in spite of changes in the dynamics of the international system.

1.2 A Case Study of Nigeria.

1.2.1 Background.

The Federal Republic of Nigeria, with an area of 923,768 square kilometres and an estimated population of 177,155,754 (July 2014 estimate) is the most populous black nation in Sub-Saharan Africa.³⁹ Nigeria’s federal system of government dates back to 1954, when Britain introduced a quasi-federal constitution to the then colony of

Sparke, ‘From Geopolitics to Geoeconomics: Transnational State Effects in the Borderlands’ (1998) 3 (2) *Geopolitics* 62.

³⁶ Slaughter (n 26) 194-195.

³⁷ Hayes (n 32) 8.

³⁸ The experience of these federal systems mentioned above will be analysed in the course of this thesis.

³⁹ The Central Intelligence Agency <<https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html>> accessed 8 April 2014.

Nigeria.⁴⁰ After gaining independence in 1960, Nigeria maintained a federal system of government. However, the practice of federalism in Nigeria has been affected by years of military interregna which have adversely affected the practice of true federal principles under the extant 1999 Constitution.⁴¹

With reference to her foreign economic policy, Nigeria is a member of the multilateral system of the WTO. She is also involved in a few bilateral and preferential trading agreements which include Generalised Scheme of Preferences (GSP) initiatives with the US - the African Growth and Opportunity Act (AGOA) and the EU- ACP Lome/Cotonou Agreement; a regional Customs Union under the Enabling Clause - the Economic Community for West African States (ECOWAS) Agreement and a number of bilateral investment treaties.⁴²

1.2.2 Statement of the Problem.

The choice of Nigeria as a case study was informed by preliminary observations of the researcher which indicated that since the start of the 4th democratic republic in 1999 there have been increased levels of participation by Nigeria's SFGs on the international scene. SFGs in Nigeria are actively engaging with international actors in order to attract Foreign Direct Investment (FDI) and to obtain international funding for their development projects.⁴³ Cross Rivers state⁴⁴ and Abia state⁴⁵ among others have signed

⁴⁰ See WO Wali, 'The Development of Federalism in Nigeria: A Historical Perspective' in Aaron Tsado Gana and Samuel G Egwu (eds), *Federalism in Africa: Framing the National Question*, Vol 1 (Africa Research and Publications 2003) 74 – 75.

⁴¹ *ibid.* The peculiarities of federalism in Nigeria are discussed in-depth in chapter four of this thesis.

⁴² For a list of Nigeria's Bilateral Investment Treaties as at June 2013, see <http://unctad.org/Sections/dite_pcbb/docs/bits_nigeria.pdf> accessed 21 March 2014.

⁴³ In relation to international financial interactions of SFGs, statistics from the Nigerian Debt Management Office (DMO) show a steady increase in state borrowing via the domestic bond market and 'on-lent' loans obtained from multilateral sources such as the African Development Bank (ADB), the World Bank, or the Islamic Development Bank. Between 2005 and 2012, the contribution of SFGs to Nigeria's external debt stock increased from 20.99% to 36.53%. See generally, The Nigerian Debt Management Office (DMO) Annual Reports 2005 – 2012 <<http://www.dmo.gov.ng/arrep.php>> accessed 31 July 2013. See also Habeeb I Pindiga and Nuruddeen M Abdallah, 'Nigeria: N1.5 Trillion Debts Weigh Down States' *Daily Trust* (Nigeria, 16 July 2013) <<http://allafrica.com/stories/201307171072.html>> accessed 31 July 2013.

Memoranda of Understandings (MoUs) and/or entered into bilateral agreements with foreign actors. Interestingly, the international partners engaged by Nigerian SFGs include national governments, counterpart SFGs and multinational corporations' i.e. state-owned enterprises (SOEs) which wield strong state influence.⁴⁶ There is also evidence of SFGs in Nigeria expanding their institutional capacity for international investment promotion purposes. For example, in 2008, Cross Rivers state introduced the Cross Rivers State One Stop Investment Centre (OSIC) to cater for the specific needs of foreign investors in the state. This state agency runs parallel to a similar OSIC at the central level. Also, in 2013, Bayelsa state introduced an investment corporation - the Bayelsa Development and Investment Corporation (BDIC) which has opened foreign investment offices in strategic locations including New York, London, Dubai and South Africa.⁴⁷

These international arrangements involving Nigeria's SFGs are not covered by the Vienna Convention on The Law of Treaties, because SFGs are not recognised as traditional subjects of international law.⁴⁸ Also, the increase in the participation of SFGs in Nigeria's international economic relations is not supported by the extant constitutional and institutional framework in Nigeria. However, it points to a growing trend which has

⁴⁴ In 2011 Cross Rivers state and a Canadian firm, Canadian Pacific Consultant Services, CPCS Transcorp, signed an MoU for the development of a transportation master plan in the state. See Johnbosco Agbakwuru, 'C/River, Canadian Firm Sign Pact on Transportation' *Vanguard Newspaper* (Lagos, 31 August 2011) <<http://www.vanguardngr.com/2011/08/criver-canadian-firm-sign-pact-on-transportation/#sthash.PKF7BuMi.dpuf>> accessed 31 July 2013.

⁴⁵ It has been reported that Abia state has sought bilateral investment opportunities with Thailand. See 'Abia to Partner with Thailand on Investment' *The Daily Post* (Lagos, 08 February 2013) <<http://dailypost.com.ng/2013/02/08/abia-to-partner-with-thailand-on-investment/>> accessed 31 July 2013.

⁴⁶ See UNCTAD, *Investment Policy Framework for Sustainable Development* (UN Publications 2013) for an in-depth analysis on the evolving role of SOEs in international trade and investment.

⁴⁷ Bayelsa Development and Investment Corporation (BDIC) <<http://www.bdic.com.ng/about.html>> accessed 02 June 2014.

⁴⁸ Schütze (n 14) 116.

significant implications on the Nigerian federal process in particular and the federalism/international relations discourse in general.⁴⁹

In view of the evidence highlighted identified above, adequate attention has not been given in the literature on federalism and international economic relations to this emerging trend in Nigeria. For example, a comprehensive study of the changing constitutional and institutional role of SFGs in foreign interactions of federal systems was conducted in 2007 by the Forum of Federations.⁵⁰ This study selected 12 federal systems for appraisal.⁵¹ The findings of the study increased the awareness about the dynamics of a new dimension in the federalism-foreign relations discourse. However, Nigeria was not considered for appraisal and till now no substantive study has been carried out about the developments in Nigeria.

Prior to this investigation, scholarship from the 1980s, 1990s and early 2000s by leading authorities on Nigeria's federalism had recognised the capacity of Nigeria's SFGs to affect international economic relations.⁵² However, the focus of these writings was on the justifications for excluding SFGs from Nigeria's international relations. For example, Nwabueze argued in 1981 that it was right for SFGs to be excluded from Nigeria's foreign policy arena because the leadership of the FG was needed to articulate a coherent foreign policy for Nigeria.⁵³ Gambari also identified these trends in Nigeria's

⁴⁹ See chapter four, section 4.7.2 (165 – 167) for more evidence of international activities of Nigeria's SFGs.

⁵⁰ The Forum of Federations is an international governance organization founded by Canada and funded by nine other partner governments – Australia, Brazil, Ethiopia, Germany, India, Mexico, Nigeria, Pakistan and Switzerland. See <<http://www.forumfed.org/en/about/index.php>> accessed 17 May 2014.

⁵¹ This study was part of a series themed 'A Global Dialogue on Federalism.' The countries selected for appraisal on the topic of foreign relations were Argentina, Australia, Austria, Belgium, Canada, Germany, India, Malaysia, South Africa, Spain, Switzerland, and the United States. See Hans Michelmann (ed), *A Global Dialogue on Federalism: Foreign Relations in Federal Countries*, Vol 5 (McGill-Queen's University Press 2006).

⁵² See generally Nwabueze (n 2); Ibrahim A Gambari, 'Federalism and the Management of External Relations in Nigeria: Lessons from the Past and Challenges for the Future' (1990) 21(4) *Publius* 113; J Isawa Elaigwu, 'Federalism, Regionalisation and Globalisation Africa' (1998) 1 *The Federalist* 72 <http://www.thefederalist.eu/site/index.php?option=com_content&view=art&id=219&lang=en&Itemid=27> accessed 26 May 2014.

⁵³ Nwabueze (n 52) 53-63.

international relations and predicted an increase in activities of SFGs in the 90s. He expressed the view that:

...limited, coordinated activity for states in well identified areas of external relations is perhaps unavoidable, if not also desirable. [But that the] challenge is how to make that happen without compromising the national government's constitutional pre-eminence in foreign affairs.⁵⁴

In 1998, Elaigwu recognised the changing dynamics of international economic interactions in federal systems in Africa due to globalisation and recommended a federally-derived compromise 'to manage the tensions between supranational self-determination and national self-determination, which takes cognisance of sub-national demands for self-determination [in federal systems].'⁵⁵ However, his findings focused on problems inherent in his recommended solution rather than on how this solution was of practical application in any specific federal systems in Africa. In the early 2000s, scholarship by academics such as Inamete, Briggs and Afeikhena considered the changing constitutional and institutional dynamics of Nigeria's international trade interactions. However, their focus was on a shift in emphasis from government control to control by the Organised Private Sector (OPS).⁵⁶ As such, there is no substantive study which has picked up on the most recent episodes of Nigeria's SFGs interacting on the international scene.

This thesis seeks to fill this gap in the literature on international economic relations in federal systems by investigating the Nigerian experience. Considering the empirical evidence which has been highlighted in this section, an investigation on Nigeria is useful

⁵⁴ Gambari (n 52) 122-124.

⁵⁵ Elaigwu (n 52).

⁵⁶ See generally Ufot Bassey Inamete, *Foreign Policy Decision-Making in Nigeria* (Associated Press 2001); Jerome Afeikhena, 'Strengthening Research and Analytical Support for Trade Policy-Making in African Countries: The case for Nigeria' in Elias T Ayuk and Mohamed Ali Marouani (eds), *The Policy Paradox in Africa: Strengthening Links between Economic Research and Policymaking* (Africa World Press 2007); Inye Nathan Briggs, Nigeria: Mainstreaming Trade Policy into National Development' (2007) African Trade Policy Centre (ATPC) Work in Progress No 52 3 <<http://www.uneca.org/sites/default/files/publications/52.pdf>> accessed 10 September 2010.

for broadening the comparative discourse about the changing constitutional and institutional dynamics of international economic relations in federal systems.

1.3 Aim, Research Questions and Hypotheses.

This thesis seeks to investigate whether central exclusivity has outlived its usefulness as a viable theory underpinning the international economic interaction of Nigeria in a globalised dispensation of international economic relations. If so, this thesis will also consider the viability of cooperative federalism as a suitable alternative for managing Nigeria's international economic interactions in a globalised era of international economic relations.

In view of this aims stated above, the following broad research questions have been formulated:

1. What is the nature of the relationship between international norms and federal systems?
2. What is the evidence that international economic relations has evolved to accommodate new actors?
3. How are the changing dynamics of international economic relations impacting on the internal configuration (constitutional and institutional) of federal systems?
4. What are the implications of the changing constitutional and institutional competence of federal systems on the theory underpinning their participation in international economic relations?
5. What factors have shaped the configuration of Nigeria's federal system?
6. How have the peculiarities of Nigeria's federal system impacted on her international economic relations?
7. How effective is Nigeria's trade regime in view of the changing patterns of international economic interactions?

In order to answer the above questions, the following hypotheses have been formulated:

1. There is a new dispensation of international economic relations which is characterised by an expansion of international norms into disciplines which were hitherto within the exclusive competence of nation-states.
2. The expanding scope of international economic norms has both an ‘outward’ and ‘inward’ effect on international and domestic regimes.
3. On the domestic front, there is a link between evolving international norms and the constitutional configuration of Nigeria (a practicing federal state). This link is predicated on the proposition that the ‘inward’ effect of expanding international norms has:
 - a. Blurred the rigid lines of sovereign demarcation between Nigeria other actors in the international system;
 - b. Fragmented the domestic policy arena for international economic participation in Nigeria by opening up opportunities for her SFGs to access the international scene.
4. As a consequence of hypothesis 3, there is a divergence between theory and functional reality in Nigeria’s extant international economic relations regime.⁵⁷
5. Cooperative federalism is a more appropriate alternative to central exclusivity for Nigeria’s international economic interactions under the current dispensation of expanding international norms.

To investigate this phenomenon, the main evidence which will be focused on in this thesis is the changing patterns of international economic relations as exemplified by the relationship between multilateralism in international trade/investment, regionalism in international trade/investment and federal systems. Where appropriate, evidence of changing patterns of interactions in other aspects of international economic relations

⁵⁷ ‘Functional reality’ in the context of this investigation means the relationship between the changing international economic system and the concomitant patterns of interaction which currently exist in Nigeria’s federal system and then what they ought to be ideally in view of changing institutional dynamics in the world economic system.

such as international finance and international competition will be considered in this thesis.

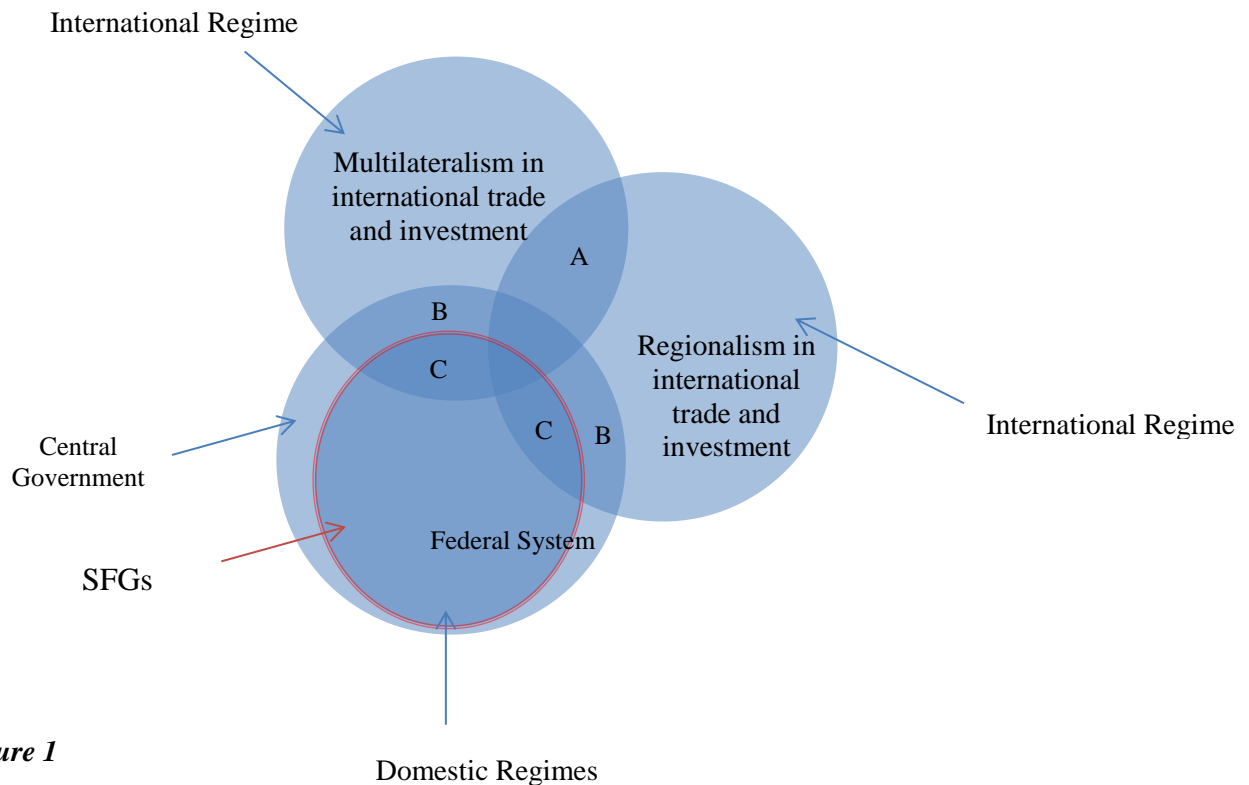


Figure 1

From the diagrammatic representation above, there are three relationships which are central in this investigation. **RELATIONSHIP A** represents the interaction between multilateralism and regionalism in international trade/investment. **RELATIONSHIP B** represents the relationship between federal systems and the two international regimes. **RELATIONSHIP C** represents the expanding constitutional and institutional competence of SFGs within federal systems which is evidenced by their increased interactions with the two international regimes.

The analysis in this thesis will be focusing on ascertaining if the changing dynamics of **RELATIONSHIP A** is facilitating the expansion of SFGs competences in international economic relations under **RELATIONSHIP C**.

1.4 The Research Strategy.

To test the hypotheses, a number of theoretical and methodological approaches have been adopted in this thesis.

1.4.1 The Socio-Legal Strategy adopted in the Thesis.

A socio-legal study seeks to locate legal phenomena within the context of other social practices which constitute its immediate environment; it is concerned with giving the law a social context.⁵⁸ This approach is generally multidisciplinary.⁵⁹

Being socio-legal, the research design and methodology of this thesis is a combination of doctrinal analysis of the relevant black letter laws of the legal regimes under consideration and a qualitative investigation in the form of qualitative key informant interviews with policy makers both in the public and private sector in Nigeria. The qualitative investigation aims to complement the black letter law analysis of the research by providing a realistic insight into the nature of Nigeria's international participation mechanism. The sources of information consulted in this thesis were wider than would have been necessary had the research been conducted solely with a black letter law methodology.⁶⁰

A benefit of adopting a socio-legal strategy for this study is that it gave the researcher flexibility with regard to the sources of data utilised. For example, the research was able

⁵⁸ Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5 Soc & Leg Stud 131.

⁵⁹ Samantha J Currie, 'Free Movement and European Union Enlargement: A Socio-Legal Analysis of the Citizenship status and Experiences of Polish Migrant Workers in the UK' (PhD Thesis, University of Liverpool 2006)17.

⁶⁰ M Salter and J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Longman 2007) 118ff 129-132, 163.

to draw on the richness of multidisciplinary perspectives which have addressed this phenomenon relating to federalism and international economic norms.

1.4.2 The Reasons for Adopting a Qualitative Approach.

Qualitative studies encompass a broad range of data collection methods which include: observation, documentary analysis and interviews.⁶¹ According to Denzin and Lincoln, ‘Qualitative research involves an interpretative, naturalistic approach to the world. This means that qualitative researchers study things in their natural settings, attempting to make sense of, or to interpret, phenomena in terms of the meanings people bring to them.’⁶²

The data used for the case study was obtained from different sources. Documentary evidence was the most utilised source of information. This consisted of primary and secondary data, including legislation, parliamentary reports and case law relating to international economic law, federalism and foreign relations in Nigeria. Another source of data was media reports including newspapers, magazines and other commentaries which were collected over a period spanning from October, 2010 to September, 2013. The use of qualitative interviews formed the third source of data. The use of these multiple sources of data for triangulation helped validate and enhance the reliability of the findings. This is in consonance with the suggestion by Yin, who advocates for this on the basis of the ethical need to confirm the validity of the data and process.⁶³

Before the qualitative data was obtained, the researcher carried out an initial textual examination of the primary sources (legislation, parliamentary reports and case law) relating to international economic participation, federalism and foreign relations in Nigeria. This was followed by an analysis of secondary literature (journal articles and commentaries) where available. After this initial analysis, the qualitative interviews

⁶¹ Currie (n 58) 23.

⁶² Norman Denzin and Yvonna Lincoln, *Collecting and Interpreting Qualitative Materials* (2nd edn, Sage 2003) 5 cited in Currie (n 61) 23.

⁶³ Robert K Yin, *Case Study Research* (2nd edn, Sage 1994).

were undertaken because there was the need to ground the theoretical analysis within the context of actual events unfolding in Nigeria. Currie supports this approach stating that ‘A commitment to qualitative research demonstrates a desire to examine social phenomenon in an in-depth and rich fashion...’⁶⁴ For example, the data collected from the interviews showed that the role of SFGs as actors in the Nigerian international economic policy formulation process is underestimated because they (SFGs) are not regarded by policy makers (at the federal level) as the principal actors in the export chain. This information would not have been obtained if a purely desk research strategy was adopted.

1.4.3 The Use of a Case Study.

The use of a case study is an integral part of the research strategy. It is said to be appropriate, just like in the present study, where one needs to understand some particular problems or situations in greater detail and where one can identify cases rich in information.⁶⁵

Understanding the peculiarities of the Nigerian experience would also be instrumental to understanding how federalism and foreign relations interact in an ever changing international scene.⁶⁶ For example, from the findings in this case study, broader generalisations would be made about the role and importance of SFGs as institutional stakeholders in the international economic relations of federal systems.

The criticisms and limitations of case studies have been taken into consideration in this thesis. For example, a criticism against the use of the case study methodology is that it lacks scientific rigour which makes it deficient for making scientific generalisation.⁶⁷ Stake counters the lack of generalisation criticism by claiming that case studies ‘are

⁶⁴ Currie (n 60) 23.

⁶⁵ Michael Q Patton, *How to Use Qualitative Methods in Evaluation* (Sage Publications 1987) 18-20.

⁶⁶ RE Stake, *The Art of Case Research* (Sage Publications 1995).

⁶⁷ D Johnson, *Research Methods in Educational Management* (Longman Group 1994); JL Jensen and R Rodgers, ‘Cumulating the Intellectual Gold of Case Study Research’ (2001) 61 Pub Admin Rev 235.

epistemologically in harmony with the readers' experience and is to that person a natural basis for generalisation.'⁶⁸ Yin also argues that the 'Purpose of a case study is to generalise to theoretical propositions, not to population as in statistical research'.⁶⁹

1.4.4 The use of International Political Economy (IPE) Literature.

The main focus of this thesis is constitutional, but applicable parallels which can be gleaned from the theoretical perspectives of the IPE literature will be considered. This is because there is interconnectivity between the constitutional and IPE dimensions of the activities of SFGs in the area of foreign relations. In the context of this investigation, a common denominator is traceable, which is the changing landscape of international relations.

Some useful theories from the IPE literature which have influenced the investigation in this thesis include Robert Putman's 'two level game' theory which analyses the intersection between domestic and international regimes and its impact on the policy choices made at both the domestic and international levels.⁷⁰ Putman focuses on the impact of domestic 'win sets' and the opportunities and constraints which these factors have on international negotiations.⁷¹ The limitation of this theory in the context of this thesis is its 'state centric' approach which does not fully engage with the role of SFGs as one of such legitimate domestic actors.⁷² Putman's approach only considers how centralised nation-state preferences in international bargaining reflect international and domestic considerations.⁷³ Furthermore, the approach does not focus on the influence which international regimes have on the emergence of new policy actors such as SFGs

⁶⁸ Lee P Ruddin, 'You Can Generalise Stupid! Social scientists, Bert Flvberg and Case Study Methodology' (2006) 12 (4) Qual Inquiry 797.

⁶⁹ Yin (1994) (n 63).

⁷⁰ Robert D Putman, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42(3) IO 427, 427-460.

⁷¹ *ibid* 435.

⁷² Kukucha (2008) (n 33) 6.

⁷³ *ibid*.

within a domestic regime. It has however been useful to this study because it recognises the connection between domestic and international regimes.

Gourevitch's 'second image reversed' approach is another related theory which addresses the influence of domestic considerations e.g. bureaucratic factors and transnational actors, in the internal/external relationship between a nation-state and international regimes.⁷⁴ This approach focuses on allocation of powers in either a 'weak' or 'strong' nation-state vis-a-vis the international regime. This theory only takes into consideration the contribution of domestic actors such as SFGs in international economic relations as members of parliament or lobbyists and pressure groups, etc. This does not capture the specific context of domestic actors directly accessing the international scene to achieve specific international economic objectives. However, it will play a useful part in identifying how SFGs have used indirect channels to enlarge their scope of participation in international economic relations.⁷⁵

Other related theories in the IPE literature which have aided the general conceptualisation in this thesis include the 'double movement' theory, which is a neo-liberal approach developed by Polanyi⁷⁶ and expounded upon by Ruggie⁷⁷ as 'embedded liberalism'.⁷⁸ This approach takes into consideration the influence of a broad range of domestic institutional, sectorial, and societal actors in the implementation of neo-liberal tenets of international cooperation. Polanyi and Ruggie argue that these factors act as checks within a domestic regime to ensure stability and security from the negative

⁷⁴ Peter Gourevitch, 'The Second Image Reversed: The International Sources of Domestic Politics' (1978) 32 (4) IO 881.

⁷⁵ See chapter four, section 4.7.2 and chapter six, section 6.3.2.

⁷⁶ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1957).

⁷⁷ John G Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism and the Post War Economic Order' [1982] IO 379 cited in Andrew Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructive Approaches to the Study of the International Trade Regime' (2006) 9 (1) JIEL 81.

⁷⁸ *ibid.*

impacts of external neo-liberal regimes.⁷⁹ This approach is useful to this investigation to the extent that it focuses on the influence of the changes in a domestic regime on the international regime.⁸⁰ However, this thesis is not restricted to how domestic actors facilitate the coping mechanism of a nation-state against the impact of neo-liberal trade rules. Instead the analysis centres more on the impact of these neo-liberal trade rules on the constitutional and institutional capacity of these domestic actors.

Another theoretical dimension in the IPE literature which has been useful is the theories on 'trans – sovereign linkage' such as, 'paradiplomacy' and 'perforated sovereignty'. These theories focus on the forays of SFGs into the international plane from a diplomatic and political angle.⁸¹ The limitation of these theories in the context of this thesis is the fact that it is more focused on the political (rather than the constitutional process) which leads to the manifestation of SFGs in the international plane.⁸²

These theories have however, influenced the researcher's understanding of the phenomenon in a broader context outside the law and have contributed to a lucid conceptualisation of the context adopted in this thesis. The IPE literature has aided in achieving a more rounded understanding of the interface between federalism and foreign relations, especially as it relates to the role of SFGs in the international economic interaction of federal systems.

⁷⁹ *ibid.*

⁸⁰ Slaughter (n 36) 184; Jackson (2003) (n 27) 799.

⁸¹ See Mingus (n 3); Andre Lecours, 'Paradiplomacy: Reflections on the Foreign Policy and International Relations of Regions' (2002) 7 *Intl Negot* 91; Carlos R Milani and Maria C Ribeiro, 'International Relations and the Paradiplomacy of Brazilian Cities: Crafting the Concept of Local International Management' (2011) 8(1) *Brazilian Admin Rev* 21; Marinana Andrade e Barros, 'Outlooks for the Legal Framing of Paradiplomacy: The Case of Brazil' (2010) 7 (1) *Fed Gov* 39.

⁸² Inaki Aguirre, 'Making Sense of Paradiplomacy? An Intertextual Enquiry about a Concept in Search of a Definition' (1999) 9 (1) *Reg & Fed Stud* 185; Milani and Ribeiro (n 81).

1.4.5 Other Alternate Explanations for the emerging Phenomenon in Nigeria's International Economic Relations

The constitutional issues to be investigated in this thesis in relation to Nigeria's changing patterns of international economic relations is by no means the only perspective that exists. There are other variables which contribute to Nigeria's changing patterns of international economic interactions. Notably, Nigeria's institutional capacity to foster a vibrant foreign policy regime has been affected by corruption, weak parliamentary processes, weak adherence to the rule of law, tribalism, nepotism and political instability to mention a few. Some of these issues will be analysed subsequently, but they are not the main emphasis of this investigation.

1.4.6 The Adoption of Working Criteria of an Ideal Regulatory Framework as a Basis for Critiquing the Nigerian International Economic Relations Regime.

Another important aspect of the research strategy is the adoption of working criteria to critique the extant constitutional and institutional framework for international economic participation in Nigeria. These criteria are drawn from the recurring themes which are used in international economic law literature for evaluating the effectiveness of policy frameworks in developing countries. They are based on regulatory recommendations developed by international specialist organisations such as the United Nations Development Programme (UNDP), the Organisation for Economic Co-operation and Development (OECD) and the World Trade Organisation (WTO), from which a minimum standard of an ideal international economic relations framework can be inferred.⁸³ These criteria are not exhaustive of what a sound policy framework ought to adhere to, but they have been selected as a minimum basis of what a good framework should include. The selected criteria are: 'integration', 'flexibility', 'coherence', 'predictability', 'accountability', 'transparency' and 'stability'. These concepts have been selected based on their recurrence within the international economic law discourse as minimal requirements for sound policy framework. They are useful for critiquing the

⁸³ See chapter four, section 4.6.

fundamental basis upon which Nigeria's institutional capacity for international economic relations is currently positioned.

1.4.7 The Comparative Element of the Thesis.

This thesis is not a comparative analysis of similar models to the selected case study. However, there will be reliance on trends from other federal countries such as the US, Canada, India, China and Belgium which have manifested either a de facto perforation of their sovereignty (e.g. China); or progressed towards a cooperative federalism model in relation to international economic policy (e.g. Canada and US); or have given formal constitutional recognition to the autonomy of component units within a country to chart a limited course on the international scene (e.g. Belgium).

The major emphasis will be on federalism models from the US, Canada and Belgium. The US was selected because the Nigerian federal system is modelled after the presidential system of the US which makes it a good yardstick for evaluating the foreign affairs powers in Nigeria. Canada and Belgium have been selected because they present two dissimilar models of cooperative federalism which is the alternate theory under consideration in this thesis. Canada has a flexible cooperative model while Belgium has a formal cooperative model. Appraising both models provides a balanced assessment of the usefulness of cooperative federalism in international economic relations.

1.5 The Research Process: Planning, Undertaking and Analysis.

1.5.1 Identifying Respondents.

In choosing respondents for the interviews, purposive sampling was employed. The advantage of this method is that it is easier for the interviewer to select samples which suit the needs of the study.⁸⁴ The inclusion criteria utilised for picking the participants were:

⁸⁴ Oisín Tansey, 'Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling' (2009) 40 (4) Pol Sci & Pol 756, 756- 772.

1. The relevance of the potential participant's expertise on foreign economic policy formulation in Nigeria i.e.
 - a.) expertise on the constitutional framework for foreign economic policy formulation in Nigeria
 - b.) expertise on the linkages between the FG and SFGs for foreign economic policy formulation in Nigeria.
2. The relevance of the potential participant's expertise on the internal/external interaction between Nigeria, the international trade system.
3. Public officials from Nigerian SFGs with tangible experience of the constitutional challenges of achieving the economic objectives of their states through foreign interactions.

The number of participants was decided based on the considerations that:

1. The nature of key informant interviews necessitates that the participants selected should have first-hand knowledge about the subject matter of the research and the number of individuals with such detailed insight into the foreign economic policy formulation process in Nigeria is limited.
2. The reliance on data from the qualitative investigation is complementary rather than the main focus of the research strategy; a limited number of participants were sufficient to achieve the objectives in the thesis.

1.5.2 Planning the Interview.

Key Informant Interviews were selected for use. Key informant interviewing takes a form much like a dialogue between informant and interviewer.⁸⁵ Questions are open-ended and in this investigation they were employed in the form of semi-structured

⁸⁵ See K Kumar, 'Conducting Key Informant Interviews in Developing Countries' (1989) AID Program Design and Evaluation Methodology Report No 13, 18
http://pdf.USId.gov/pdf_docs/PNAAX226.PDF accessed 21 March 2014.

interviews to triangulate the primary and secondary data which were earlier obtained. A semi-structured interview is a qualitative method of inquiry which combines a pre-determined set of open questions with a flexible and fluid structure which gives the opportunity for the interviewer to explore particular themes or responses further.⁸⁶ Semi-structured interviews allow respondents to discuss issues which may not have been considered initially by the interviewer.⁸⁷

1.5.3 Designing the Interview Questions.

In structuring the interview questions, major questions were developed into the form of a general statement, which was then followed by a sequence of sub-questions for further probing. The literature which had been studied earlier provided a guideline for formulating the interview questions. The interview questions were designed based on the objective of ascertaining the level of participation by SFGs in Nigeria's international economic relations (mainly trade and investment aspects). The questions were designed to both elicit specific answers and to open up opportunities for the participants to give broader views on the general subject matter.⁸⁸

1.5.4 Conducting the Interviews.

The researcher conducted the interviews in Nigeria during the summer (June – July) of 2012. A total number of seven respondents participated in the interviews. The location for the interviews was Nigeria (Abuja, Lagos and Benin City). The researcher is familiar with the geo - political system of Nigeria and this helped in the planning of the logistics for the interviews. In Abuja, four respondents participated in a focused group interview; they were all policy makers with the Federal Ministry of Trade and Investment. Merton and others define a 'focused group interview' as 'a qualitative method in which researchers interactively question a group of participants in order to test theory-driven

⁸⁶ S Michael and others, 'Semi-structured Interview' The SAGE Encyclopedia of Social Science Research Methods <<http://www.srmo.sagepub.com/view/the-sage-encyclopedia-of-social-science-research-methods/n909.xml>> accessed November 27, 2012.

⁸⁷ *ibid.*

⁸⁸ A sample of the interview questions is provided as an Appendix at the end of this thesis.

hypotheses.’⁸⁹ Grim, relying on the work of Merton identifies five key characteristics of focused group interviews. These are: participant involvement in a shared concrete situation (shared experience), the group interviews are conducted until no new information is obtained (topic saturation), there should be content analysis that leads to hypotheses (hypothesis testing), there is use of an interview guide to test the hypotheses (question route) and the focus is on the subjective experiences of the participants (subjective experiences).⁹⁰

The focus group interview conducted in Abuja satisfies these criteria because the participants were all policy makers involved in the actual process of policy formulation and implementation in Nigeria. Their experience was shared and concrete enough to substantiate the value of the data obtained from the discussions. Also, topic saturation was achieved as the discussions were exhaustive of the outline prepared by the researcher.

Content analysis was actualised because the data obtained from the discussions was useful for developing and reviewing the hypotheses which have been adopted in this thesis. There was an interview guide to test the hypotheses formed before the interviews and this helped to direct the ‘question route’ during the discussions. Finally, the focus was on the subjective experiences of the participants. It was based on their expertise and experience with regard to foreign economic policy formulation and international relations in Nigeria.

An interview was conducted in Lagos with one participant – a policy maker with the State Ministry of Trade and Commerce. In Benin, two interviews were conducted with an academic consultant responsible for the drafting of the NTPD 2002 and a policy maker with the State Ministry of Trade and Commerce.

⁸⁹ Robert K Merton and others, *The Focused Interview: A Manual of Problems and Procedures* (The Free Press 1990) cited in Brian J Grim and others, ‘Focused Group Interviews as an Innovative Quantitative Methodology (QQM): Integrating Quantitative Elements into a Qualitative Methodology’ (2006) 11 (3) Qual Rep 516, 517.

⁹⁰ Merton and others (n 88) 517.

Notes were taken during the interviews rather than tape recordings. This was because the respondents during the first interview (in Abuja) said that a direct authorisation was required from the Minister of Trade and Investment before they could allow tape recordings. Considering the time and effort that had already gone into securing an audience, it was imperative to re-strategise. Subsequently, the researcher continued with this approach, because it was observed during the first interview in Abuja that note-taking encouraged a relaxed atmosphere during the interview. The disadvantage of taking notes was the inability to record events verbatim. However, the less formal atmosphere made the respondents more forthcoming with information.

The interviews were conducted in the official premises of the participants. It is believed that conducting the interviews in the premises of the participants may lead to an increased level of disclosure from the participants, as they are more relaxed.⁹¹ The researcher was mindful that interviews might increase the chances of bias either due to the poor phrasing of questions or the deliberate attempts by the participants to mislead or try to defend their positions on a particular issue since interviewees have their own personal subjective worldviews and opinions.⁹² The possibility of bias was however mitigated by the fact that respondents from both the public and private sector were interviewed with the researcher distilling the information from an objective standpoint.

1.5.5 Challenges Experienced.

Time was a major constraint during the interview process; it disrupted the interviewing schedule and led to a change of interviewing tactics. For example, the researcher initially set out to interview one participant at a time. However, the researcher had to conduct a focus group interview in Abuja. It became necessary to alter plans, because gaining access to the participants proved to be difficult, especially in Lagos and Abuja. The Legal Adviser of the Federal Ministry of Trade and Investment (FMTI) who was the

⁹¹ R Larossa, 'Ethical Dilemmas in Qualitative Family Research' (1981) 43 J Marriage Fam 303, 303-313.

⁹² Thomas Diefenbach, 'Are Case Studies More than Sophisticated Storytelling?: Methodological Problems of Qualitative Empirical Research Mainly Based on Semi Structured Interviews'(2009) 43 Qual Quant 875.

‘gate keeper’ and facilitator of the interview in Abuja had to put in considerable effort and resources before securing a meeting with the Director for Trade. A personal relationship with the Legal Adviser of the FMTI proved to be an indispensable asset which facilitated access to the desired participants. The Director then instructed four of his subordinates to attend to the researcher at the same time. Considering that it took two days, a lot of phone calls and personal favours to even get an audience with the participants, the researcher decided to change interviewing tactics and hold a focus group interview with the four respondents.

1.5.6 Analysing the Qualitative Data.

Miles describes qualitative data as an ‘attractive nuisance.’⁹³ This is because it is a laborious and time consuming exercise to transcribe data collected from interviews. In addition to the challenging process of transcribing, interpretation and analysis is also a ‘problem’ because there is ‘no accepted set of defined conventions available to researchers who set out to analyse qualitative data.’⁹⁴ This makes the process very subjective and as a consequence, ‘it is the researcher’s interpretation of data that shape the emergent codes, theory and all round analysis.’⁹⁵

In this research, transcribing was aided by the fact that notes were used during the interviews. The researcher started working on the notes immediately after each interview was conducted, so as to aid recollection of information that was not written down during the interviews. This method raises the issue of ‘interviewer bias’ which comes from the ‘deficiencies of the human analyst’.⁹⁶ According to Currie, this includes ‘The tendencies to ignore information which conflicts with themes and ideas already held, and to give less attention to information which is more difficult to access.’⁹⁷ These tendencies are a

⁹³ Matthew B Miles, ‘Qualitative Data as an attractive Nuisance: The Problem of Analysis’ (1979) 24 Admin Sci Qlty 590.

⁹⁴ Currie (n 64) 50.

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ *ibid* 51.

significant issue in the context of this research because of the manner in which the information was recorded. The researcher sought to mitigate this deficiency by developing the notes immediately after each interview session was completed. Also, the researcher being aware of the tendencies mentioned above ensured that no emphatic assertions are made or inferred from the opinions of the participants. Considering the limited reliance on the qualitative data, these tendencies do not diminish the value of the data because they have achieved their primary purpose, which is to complement the doctrinal analysis.

1.5.7 Ethical Considerations.

This research was conducted in compliance with the University of Liverpool Ethics Policy. The researcher went through the ethical approval process before commencing the field work in June 2012. The only major ethical consideration during the ethical approval process was the issue of security for the researcher. This was due to political instability in Nigeria as a result of terrorist attacks by insurgent groups. As a consequence, the researcher had to maintain a high level of security consciousness during the trip. With regard to the interview process, the researcher maintained the appropriate standards of ethics necessary for a study of this nature. The researcher was very open with interviewees, explaining the reason for the interview and how the data obtained was going to be used.

1.6 Limitations of Study.

In relation to the interactions between the multilateral and regional trade systems, the scope of this thesis will be limited to identifying the existence of a complexity inherent in the international trade regulatory regime due to fluctuating relationship between both regimes. This thesis will not attempt to provide a solution which addresses the complex relationship between multilateralism and regionalism. Rather, the thesis will only consider the impact of this evolving relationship on the emergence of a new dispensation of international economic relations.

In relation to the internal constitutional interaction between SFGs and the central government within a federal system (Nigeria in this case), reference to ‘SFGs’ is limited

to just state governments. This thesis excludes the role of local governments and non - state actors within Nigeria's international foreign economic policy framework. Although these actors would be acknowledged in the thesis as a significant contributor to the foreign economic policy process, their existence and importance is not crucial to achieving the objectives of this thesis and their inclusion would detract attention from the actual focus of the thesis.

1.7 Structure of Thesis.

The thesis is divided into 7 chapters including this introduction chapter. The aim of this preliminary chapter is to introduce the background to the research, explain the reasons for embarking on the research and to discuss the objectives of this thesis. This chapter also seeks to explain the research strategy and methodology adopted in testing the hypotheses. This chapter also clarifies the scope and limitations of the thesis.

Chapter Two is titled: An overview of the relationship between federal systems and the international economic regulatory system in the specific context of trade (multilateral and regional trade regimes).

The chapter introduces the relationship between federal systems of government and international norms. Focusing on international trade as a sector of international economic relations, this chapter identifies compatibility issues in the relationship between the international economic norms and federal systems.

Chapter three is titled: The dynamics of a new dispensation in international economic relations.

The objective of chapter three is to demonstrate how evolving patterns of interaction in international trade and foreign direct investment have shaped a new dispensation of international economic interactions which affects the distribution of powers in federal systems.

The central argument in this chapter is that geopolitical changes have redefined the dynamics of international economic regimes which in turn is facilitating the proliferation

of new actors in the international economic process. This chapter will set out the distinguishing characteristics of this new dispensation and its impact on participation of federal systems in international economic relations.

Chapter four is titled: The evolution of Nigeria's constitutional and institutional framework for international foreign economic interactions (1960 –2013).

The chapter has two aims. First, it traces the evolution of the constitutional and institutional framework for Nigeria's international economic relations from 1960 – 2013 within the context of the evolution of Nigeria's federal system of government. The emphasis is on the distribution of foreign affairs powers between the Federal Government and the SFGs. The chapter focuses on two distinct eras – civilian and military rule - in the development of Nigeria's federal system. The chapter analyses how these two political regimes have shaped the constitutional and institutional patterns of Nigeria's international economic interactions. The second aim of this chapter is to critique the extant framework by relying on the working criteria adopted from the recommendations of specialised international agencies.

Chapter five is titled: A theoretical basis for the role of SFGs in Nigeria's international economic interactions: An appraisal of two constitutional viewpoints (central exclusivity and cooperative federalism).

This chapter builds on the analysis in chapters three and four. The objective of this chapter is to analyse the advantages and disadvantages of two theories underpinning the conduct of foreign relations in federal systems. The existing status quo (central exclusivity) and an alternative option of cooperative federalism are appraised from a constitutional federalism perspective. The aim of the analysis in this chapter is to identify which viewpoint is best suited to cater for the evolving role of SFGs in Nigeria's international economic interactions.

Chapter six is titled: Justifying a cooperative approach for the management of international economic relations in Nigeria.

The objective in this chapter is to assess the workability of a cooperative federalism model in Nigeria. In this chapter, arguments are proffered to justify the utilisation of a cooperative federalism model as constitutional and institutional framework for Nigeria's international economic interactions in light of the changing patterns in the international system.

Chapter seven is the discussion of the findings and contributions of the thesis and the final conclusion.

1.8 Conclusion.

This thesis seeks to emphasise the need for Nigeria to re-assess her institutional participation in international economic relations because the international system has evolved to a point which now favours countries which have dared to be bold and dynamic in their endogenous constitutional configuration. This thesis will also draw attention to the need for a pragmatic approach to the conceptualisation of the emerging trend in Nigeria. This is because it is believed that each country's ability to re-invent its international economic policy stance must remain flexible and fit the peculiarities of that country's economic and political configuration. This thesis will draw parallels from other federal jurisdictions to ascertain if that there is significant economic advantage to be gained from pursuing enhanced cooperation between the FG and SFGs in Nigeria's international economic relations.

In the broader context of the federalism/international relations discourse, the findings of this thesis will seek to complement the existing literature which focuses on the interface between federalism and foreign relations. More specifically, it will address this interface as it relates to international economic interactions of federal systems. It is anticipated that this will aid in conceptualising the relevance of the constitutional process within a federal system to the changing patterns of interactions under the current dispensation of international relations. This thesis will also seek to contribute to the literature which focuses on the impact of the evolving relationship between multilateralism and regionalism on the dynamics of the international economic order.

Also there is a growing prominence of neo-liberal tenets in international economic literature which advocates that international economic relations should be purely dictated by market forces.⁹⁸ However, this thesis will seek to highlight that irrespective of the market oriented dimension of international economic relations, the role of government institutions is still crucial to a holistic conceptualisation of the international economic order.

⁹⁸ See JJ Palacios, 'Globalisation's Double Movement: Societal Responses to Market Expansion in the 21st Century (The Eighth Karl Polanyi International Conference, Mexico City, November 2001) 3-4; Slaughter (n 79) 184.

Chapter Two: An Overview of the Relationship between Federal Systems and International Economic Norms: The Multilateral and Regional Trade Systems as a Case Study.

2.1 Introduction.

The aim of the chapter is to demonstrate how in the historical development of international economic norms, the participation of federal systems has created a special challenge due to the propensity of SFGs in federal systems to affect international economic relations.

This chapter contributes to the overarching argument of the thesis by laying a foundation for further consideration in subsequent chapters of the relationship between international economic regimes and the domestic constitutional regimes for international economic policy participation in Nigeria; a practicing federal system.

The chapter is divided into three sections. Section one introduces federalism as a process. In this section, salient attributes of federalism which determine the scope of international economic powers allocated to each level of government in a federal system are identified. Section two introduces multilateralism as a platform for the regulation of international trade. In this section, the relationship between federalism and the multilateral trade system is considered. The aim is to identify the compatibility issues inherent in this relationship. Section three introduces regionalism as a platform for the regulation of international trade. Like the previous section, the aim is also to identify the compatibility issues inherent in this relationship.

2.2 Federalism: Origin.

The origin of federalism as a political system of government can be traced back to ancient Greek civilisation.¹ Between the 4th and 2nd centuries BC, political relations in

¹ For an in-depth analysis of the historical origin federalism see Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Broadview Press 2006) 85; Dragan Bataveljić, 'Federalism: The Concept, Development and Future' (2012) 2(24) Intl J Human & Soc Sci 21.

ancient Greece were characterised by the formation of political alliances between independent Greek states.² These unions were formed with the aim of pursuing common goals such as resisting oppressors or conquering common enemies.³ A prominent example of such an alliance was the ‘Archaic League,’ a coalition of Greek states which was formed in the 3rd and 2nd century BC to resist the aggression of Macedonia; a northern Greek state.⁴ A significant attribute of these alliances was that the individual identities of the states were not submerged within the new alliances.⁵

Over time, the concept of federalism evolved as a political system with prominent expressions of federalism springing up in the present day Switzerland and the US in 1291⁶ and 1774 respectively.⁷ These two federal systems subsist to date and have become landmark examples which epitomise federalism as a system of government. Currently, federalism is practiced by over 25 states in the international system.⁸

2.2.1 Federalism as a Process.

A popular meaning of Federalism is found in its description as a political system where power is divided between a minimum of two levels of government under a treaty (foedus) which prescribes and delineates the scope of powers to be exercised by each level of government.⁹ There are other dimensions to understanding the concept of

² Itsey E Sagay, ‘Nigeria: The Unfinished Federal Project’ Keynote Lecture (The 8th Justice Idigbe Memorial Lecture, 30 April 2008)14.

³ *ibid.*

⁴ Bataveljić (n 1) 21.

⁵ Sagay (n 2) 14.

⁶ The Swiss federalism started with an alliance of three forest cantons in a union known as the ‘Waldstatte.’ Sagay (n 5) 15.

⁷ The US confederacy of 1774 became a full-fledged federal system in 1789.

⁸ See Forum for Federalism <<http://www.forumfed.org/en/federalism/federalismbycountry.php>> accessed 14 May 2014.

⁹ Ben Nwabueze, *The Presidential Constitution of Nigeria* (Hurst & Company 1982) 37.

federalism which the description above does not capture. Birch¹⁰ supports this view stating that the meaning of federalism in any particular study 'Is defined by the student in a manner which is determined by the approach which he wishes to make to his material.'¹¹ He identifies four different approaches to an understanding of federalism introduced by federalism scholars. These are Wheare's¹² institutional approach, Friedrich's¹³ dynamic process approach, Livingston's¹⁴ social organic approach and Riker's¹⁵ bargain approach. The existence of different approaches does not suppose that one is more appropriate than the other. Rather, each approach is just a different dimension to the same multifaceted concept of federalism. However as a starting point, this differentiation in approach is useful in this thesis because the primary focus in this chapter will be the dynamic process approach to understanding federalism. This dimension is useful for understanding the evolving role of SFGs in international economic relations.

Friedrich¹⁶ views federalism as a process rather than a design because it represents a method by which 'a number of separate political communities enter into arrangements for working out solutions, adopting joint policies; making joint decisions on joint problems and conversely the process by which a unitary political community becomes differentiated into [a] federally engaged whole.'¹⁷ Watts¹⁸ holds a similar view arguing

¹⁰ AH Birch, 'Approaches to the Study of Federalism' [1966] Pol Stud 15.

¹¹ *ibid.*

¹² See generally KC Wheare, *Federal Government* (4th ed OUP 1963).

¹³ Carl Friedrich, 'New Tendencies in Federal Theory and Practice' (6th World Conference of the International Political Science Association, Geneva, September 1964) 1-7.

¹⁴ WS Livingston, *Federalism and Constitutional Change* (Clarendon Press 1956) 3.

¹⁵ William H Riker, *Federalism: Origin, Operation, Significance* (Little Brown 1964) 11 cited in Ivan Bernier, *International Legal Aspects of Federalism* (Longman 1973) 3.

¹⁶ Friedrich (n 13) 1.

¹⁷ *ibid* 7.

¹⁸ R Watts, 'Contemporary Views on Federalism,' in Bertus de Villiers (ed), *Evaluating Federal Systems* (Juta & Co 1994).

that federalism is ‘not an abstract ideological model to which political society is to be brought into conformity, but rather a way or process of bringing people together through practical arrangements intended to meet both common and diverse preferences of people.’¹⁹

The significance of these definitions to this thesis is twofold. First, it means that the federal process is ideally meant to encourage joint participation and shared responsibility for the issues which are common to the parties in the federal arrangement. Second, it supposes that the issues which necessitate joint participation in the federal process are never static and as a consequence the political and constitutional response to the evolving issues faced by the components to a federal setup must evolve accordingly.²⁰

These points are central to the arguments of this thesis because they support a proposition that the changes in the constitutional and institutional interaction between federal systems and international economic regimes are a necessary response associated with the evolving federal process. Friedrich’s definition also identifies ‘joint participation’ as a default position synonymous with the federal process.

The focus on federalism as a process is also significant to this investigation because the salient qualities inherent in the process make federal systems more susceptible than a non – federal system to exogenous influences.²¹ The susceptibility of federal systems to external influences (e.g. an expanding international economic relations) is due to the power configuration within federal systems which is delicately balanced between the different tiers of government; they are always eager to expand or exert more constitutional powers within the federal arrangement so as to promote and protect their interests.²²

¹⁹ *ibid* 7.

²⁰ Bernier (n 15) 3.

²¹ Richard Vengroff and Jason Rich, ‘Paradiplomacy and the Canadian Provinces’ (Annual Meeting of the American Political Science Association, Connecticut, September 2004) 7.

²² *ibid* 7. This view also aligns with the definition of federalism introduced by Vile in 1961. See generally MJC Vile, *The Structure of the American Federalism* (OUP 1961) 194 -199 cited in Bernier (n 20) 4.

2.2.2 The Evolving Role of SFGs in the Federal Process.

Based on the premise established in the preceding section, it can be argued from a realist stand point that most federal systems are born out of a compromise arrangement between geographically contiguous settlements seeking a strategic alliance so as to benefit from their strength which arises when the parties pool their resources together.²³ Furthermore, the parties to a federal arrangement may be of unequal strengths. While some parties to a federal arrangement may be economically strong enough to stand on their own, some others may be dependent on the strength of the union for survival. This raises two propositions: First, the stronger components presumably accede to a federal union on the premise that there will be elasticity in the federal arrangement which is characterised by some degree of autonomy exercised by the federating units.²⁴ Second, the weaker components in a federal arrangement are interested in a harmonious arrangement to the extent that the federation serves their best interests.

The underlying motives of the parties to a federal arrangement play a significant role in determining the level of autonomy demanded by the component units. In effect, the participating components within a federal system have a tendency to push the boundaries of the constitutional arrangement to suit their self – interests. On the other hand, the central government in a federal system usually seeks to balance or curtail these tendencies by gravitating towards a unified stance when expedient or on certain issues which are considered vital to the survival of the union. This may be achieved by carving out more federal oversight and regulation of sensitive activities or subject areas such as defence and foreign policy.

The implications of different bargaining strengths described above create a peculiar dynamic in the federal relationship whereby the central government acts as a counter-balance to the powers exercisable by the SFGs. More importantly, it is argued that the existence of these underlying circumstances in the federal process shifts the emphasis from a horizontal treaty between equal state parties to a vertical treaty between a federal

²³ This view is drawn from Riker's bargain approach to an understanding of federalism. Riker (n 15) 11.

²⁴ Vile (n 22) 199.

government and its component states; which are held either loosely or tightly together depending on the extent of powers apportioned either way.

This fluctuating power balance determines the nature and scope of competences available to SFGs in international interactions at every given point in time in the evolution of a federal system. This is unique to each federal system and it creates a cycle which is constantly evolving in response to the external and internal realities of the social, political and economic life of each federal system.

Arising from the arguments above, it will be argued in the course of this thesis that the plenary or dominant powers enjoyed by central governments in relation to foreign policy are not an immutable position inherent in a federal process, but rather a compromise which central governments have carved out over time in the evolution of the federal process.

Having established this foundation, the rest of this chapter will focus on the relationship between federal systems and international trade regimes (a subset of international economic relations). The aim from here on is to establish the relationship between the regimes and examine the challenges which the peculiarities of the federal process pose to the operation of these international economic regimes in federal systems.

2.3 The Multilateral Trade System.

Since the inception of the multilateral trade framework in the aftermath of the Second World War (WW2), the tenets of multilateralism particularly under the auspices of the General Agreement on Tariffs and Trade/ World Trade Organisation (GATT/WTO), have had a tremendous impact on international trade relations serving as a veritable platform for the integration of the world economy. Multilateralism is relevant to the discourse in this thesis because the evolution of multilateralism in international trade is a significant factor which has affected the international economic participation of federal systems.

Generally, multilateralism in international relations has centred on cooperation amongst nation-states and a consequential ceding of some sovereign powers by nation-states to

international organisations thereby enabling the attainment of objectives for which they had been introduced.²⁵ The transition towards global-level governance and the increase in prominence of international organisations such as the WTO has been resisted by the nation-states. However, the inevitability of the shift in focus from nation-state centred practice to shared competence between nation-states and international organisations is evident from the outlook of international relations in the 21st century.²⁶

More specifically, multilateralism is important to this discourse because it is argued that multilateralism in international trade has led to a relocation of regulatory powers from the nation-state towards globalised and localised levels.²⁷ In the context of a federal system, it will be argued in chapter three that the downward movement of power has encouraged the participation of SFGs in international relations.

The pertinent question which then springs to mind is how has multilateralism coped with the peculiarities of the federal process as described in section 2.2?

The aim in this section of the chapter is to introduce the concept of multilateralism in international trade and its relationship with federal systems. In the course of this analysis, the impact of multilateralism on the participation of SFGs in international trade will be examined in light of the extant federal compliance provision (art XXIV: 12) of the GATT to ascertain how the multilateral trade system has tackled the peculiar constitutional configuration within federal systems.

2.3.1 Multilateralism in International Trade.

Prior to WW2, the majority of international trade relations were regulated under the rubric of regional, bilateral and at best plurilateral agreements.²⁸ In the aftermath of

²⁵ Ian Brownlie, *Principles of International Law* (4th edn, Clarendon Press 1990) 679.

²⁶ For an in-depth analysis on the evolution of the relationship between international organisations and nation-states, see generally Jose E Alvarez, *International Organisations as Law-Makers* (OUP 2005) 8.

²⁷ *infra* chapter three.

²⁸ See Michael J Trebilcock and Robert Howse, *The Regulation of International Trade* (Routledge 1995) 20.

WW2, multilateralism was given a prominent expression in the general scheme of international relations and international trade in particular.²⁹

Notable feats achieved under the multilateral trade forum include the introduction of the General Agreement on Tariffs and Trade (GATT) and two other economic institutions – the World Bank and the International Monetary Fund (IMF).³⁰ The GATT was meant to be an interim arrangement pending the entry into force of the International Trade Organisation (ITO) Charter, at which point GATT would simply disappear.³¹ The ITO did not materialise at that time but the contracting parties out of necessity were forced to self-regulate the GATT irrespective of the botched ITO plans.³²

The economic rationale for the multilateral trade system is based on the theory of ‘comparative advantage’ as developed by the classical economist David Ricardo (Ricardo built his theory of comparative advantage on Adam Smith’s ‘absolute advantage’ theory). The theory of comparative advantage was further developed by Heckscher, Ohlin and Samuelson who argued that countries have different factor endowments of labour, land and capital inputs.³³ They asserted that countries will specialise in and export those products which use intensively the factors of production with which they are most endowed.³⁴ This theory states that every country should focus its economic production in the areas where it has its greatest comparative advantage i.e.

²⁹ See Rorden Wilkinson, *Multilateralism and the World Trade Order* (Routledge 2000) 12.

³⁰ These two economic institutions are charged with the responsibility of providing financial assistance and advice to state and non – state actors alike. See: <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,contentMDK:20053333~menuPK:63762~pagePK:36726~piPK:36092~theSitePK:29506,00.html>> accessed 12 November 2010; <<http://www.imf.org/external/about/histcoop.htm>> accessed 12 November 2010. See also Frank J Garcia, ‘Global Justice and the Bretton Woods Institutions’ [2007] JIEL 461.

³¹ James Scott, ‘Developing Countries in the ITO and GATT Negotiations’ [2010] JITL & P 2.

³² Wilkinson (n 29) 13ff, 16-18 and 20; Mitsuo Matsushita and others, *The World Trade Organisation: Law, Practice, and Policy* (2nd edn, OUP 2006) 2; Trebilcock and Howse (n 28) 21.

³³ Peter M Morrow, ‘Ricardian–Heckscher–Ohlin Comparative Advantage: Theory and Evidence’ (2010) 82 (2) J Int Econ 137; Marcella Nicolini, ‘On the Evolution of Institutional Comparative Advantages’ (2011) 22 SCED 162.

³⁴ Nicolini (n 33) 163-165.

where it has a margin of superiority in the production of a good or service, while depending on international trade with other countries for the products where it has less comparative advantage i.e. where the opportunity cost of production is lower.³⁵

Another significant attribute which made the multilateral trade system appealing for the regulation of the international trade relations is the adoption of reciprocity, and non – discrimination amongst nations in their trade relations. These two principles are encapsulated in the concepts of Most Favoured Nation (MFN) and National Treatment (NT). The MFN principle proposes that countries must extend the same trade terms and preferences amongst all its trading partners without discrimination.³⁶ The NT principle on the other hand is founded on the concept that a country accords the same treatment and preferences it gives to its domestic industries to foreign industries operating within its jurisdiction. This only applies once a product, service or item of intellectual property has entered the market.³⁷

The GATT became one of the single most important trade agreements of its time as it introduced a new dimension to international economic relations with its liberal trade theories. From 1947 to 1994, the GATT remained self-regulatory with a number of negotiation rounds taking place between 1947 and 1994. The GATT contracting parties also used ad hoc committees to run the GATT 1947 and to settle disputes between contracting parties.³⁸

³⁵ *ibid.*

³⁶ Art I The General Agreement on Tariffs and Trade (GATT) 1994 <http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf> assessed 10 August 2010; art II The General Agreement on Trade in Services (GATS) <http://www.wto.org/english/docs_e/legal_e/26-gats.pdf> assessed 10 August; art IV The Agreement on Trade - Related Aspects of Intellectual Property Rights (TRIPS) <http://www.wto.org/english/docs_e/legal_e/27-trips.pdf> assessed 10 August 2010. For a history of the MFN see generally, JH Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press 1997) 133; Richard H Snape, 'History and Economics of GATT's Article XXIV' in Caroline Freund (ed), *The WTO and Reciprocal Preferential Trading Agreements* (Edward Elgar Publishers 2007) 72 – 77 and Foreman-Peck, *A history of the World Economy: International Economic Relations since 1850* (Harvester Wheatsheaf Books Ltd 1983) 56 – 57.

³⁷ Art III GATT (n 36); art XVII GAT (n 36); art III TRIPS (n 36). See also Trebilcock and Howse (n 32) 75.

³⁸ Matsushita and others (n 32) 2-3.

2.3.2 The WTO and the Multilateral Trade System.

The interrelationship between states and international organisations and the ability of the latter to distinguish and/or carve a niche for themselves with regards to their powers and functions has been a fundamental stimulant for the wide acceptance of multilateralism over the years. Analysing the contribution of the WTO to the rise of multilateralism provides a template from which parallels can be drawn when analysing the participation of SFGs in international economic relations. Specifically, the efforts of the WTO to liberate itself from the control of its nation-state members is a good example of how the dynamics of international economic relations is changing from a nation-state centred focus to a more encompassing process which now accommodates new actors such as international organisations at the international level and SFGs at the local level.

The WTO was formally established in 1995 under the instrument of an agreement which was negotiated and signed during the Uruguay round of multilateral trade negotiations. The WTO was established to take up the running of the functions and objectives of the GATT 1947.³⁹ The negotiations during the Uruguay round were significant in themselves because they led to the expansion of the scope and functions of the multilateral trade system. The introduction of agreements on previously uncharted areas such as trade in services, trade in intellectual property rights and government procurement increased the dynamism of the multilateral trade system under the auspices of the then newly introduced WTO.

Furthermore the introduction of the WTO in 1995 was a fundamental step in the process of distinguishing the multilateral trade system from its participants- the nation-states. Prior to the inception of the WTO, the GATT system was predominantly dictated by its nation-state members.⁴⁰ An expression of this difference in the two regimes is found in

³⁹ *ibid* 6-7.

⁴⁰ See generally Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2004) 11.

the juxtaposition of the dispute settlement mechanism under the GATT system against that of the WTO system.⁴¹

The efforts of the WTO to liberate it from the nation-states and forge an independent existence in international trade regulation have been extensively researched as the constitutionalism of the WTO. Cass traces the origin of the constitutionalism debate in international trade law to the conclusion of the Uruguay Round of multilateral trade negotiations which led to the introduction of the WTO.⁴²

Faux examines the significant attributes which point to the emergence of a constitutional order in international trade norms.⁴³ According to him:

The language of, the WTO, like the language of NAFTA, is "constitutional" It sets up supranational governance with powers to override what had previously been the province of sovereign states.... [B]oth NAFTA and the WTO perform the traditional role of constitutions. They entrench certain inviolate principles or norms that are above the reach of any national legislature to alter; set limits on the behaviour of governments; define rights of citizenship; establish a judicial system to interpret its own texts in the case of conflicts; and provide for the enforcement of the court's decision.

Dillon is not in support of constitutionalism in international regimes such as the WTO because she believes that 'The constitutionalisation of the world trade system has elevated it in legal thinking and given it a false aura of permanency and immutability.'⁴⁴

⁴¹ The dynamic role of the Trade Policy Review Mechanism (TPRM) and the Specialised Committees of the WTO are further expression of the innovations under the WTO which have distinguished it as an institution which is autonomous of its members and has consequently led to the wider acceptance and appeal of the principles of multilateralism in international trade.

⁴² Deborah Z Cass, *The Constitutionalisation of the World Trade Organisation: Legitimacy, Democracy, and Community in the International Trading System* (OUP 2005) 16.

⁴³ Jeff Faux, *The Global Class War: How America's Bipartisan Elite Lost Our Future—and What It Will Take To Win It Back* (John Wiley 2006) 161.

⁴⁴ Sara Dillon, 'Opportunism and Trade Law Revisited: The Pseudo-Constitution of the WTO' (2013) 54 Boston L Rev 1005.

She further argues that the danger in this constitutional elevation of the world trade system of the WTO is due to the misplaced focus by legal academics on ‘...the technical aspects of trade disputes rather than on the critical issue of the normative nature and effects of the system on those most affected-Workers.’⁴⁵

Cass is also sceptical of the claims to a constitutional order in international trade law. She argues thus: ‘...the WTO is not constitutionalised, and nor, according to any current meanings of the term, should it be.’⁴⁶ She does not deny the evidence which points towards a constitutional order, but she believes that that ‘constitutionalisation of the WTO should be seen as an imperfect process rather than as a “fait accompli.”’⁴⁷ She further admits that ‘thinking about WTO constitutionalisation is normatively necessary in view of the inadequacies of the ‘received account’ of national constitutionalism in a globally interdependent world.’⁴⁸ This point will be revisited in chapter three.

In view of the historical evolution and theories underpinning the multilateral trade system, an area which has posed a challenge to the tenets of the international trade system is the involvement of federal systems in the international trade process. The next section of this thesis will consider the compatibility issues in the relationship between federalism and multilateralism in international trade.

2.4 The Multilateral Trade System and Compliance in Federal Systems.

Generally, the relationship between federalism and international law has been fraught with inconsistencies. Brenier rightly describes the nature of this relationship as one of ‘attraction-repulsion.’⁴⁹ Historically, international law responded to the appearance of federal states by ignoring their constitutional peculiarities and sought to treat them like

⁴⁵ *ibid* 1018-1020.

⁴⁶ Cass (n 42).

⁴⁷ *ibid* 246.

⁴⁸ *ibid* 240-245.

⁴⁹ See generally Brenier (n 22) 1.

other sovereign states.⁵⁰ In line with this approach, the general rule which has existed in international law for the better part of Westphalian statehood is that federal systems have a responsibility to ensure that the acts or omissions of their SFGs do not infringe on international law obligations which the state is subject to.⁵¹ This responsibility is not negated even in situations where the internal law of a federal system does not give the central government powers to compel its SFGs.⁵² This customary international law obligation applies as the default rule unless a contrary intention is evidenced in the text of an international treaty.⁵³ In some instances, international treaties have ‘opt out’ clauses negotiated into them.⁵⁴ This can operate by way of federal state clauses⁵⁵ which make it possible for federal systems to expressly escape liability if their SFGs do not comply with the requirements of a treaty in areas where they have constitutional competence to act.⁵⁶ Hayes opines that the first question to ask when examining international regulation of federal nation/states is whether the treaty language evidences an intention to ‘opt out’ of the default rule of nation/state responsibility for SFGs.⁵⁷ If this is not stated in the treaty, then the general rule applies.⁵⁸

Interestingly, although customary international law imposes this default obligation on federal systems, there is no general customary international law rule which stipulates

⁵⁰ *ibid.*

⁵¹ *ibid* 6; Edward T Hayes, ‘Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories’ (2004) 25(1) *Nw J Intl L & Bus* 1, 20. See also art 27 – 29, Vienna Convention on the Law of Treaties 1969 UN Doc A/CONF 39/27.

⁵² Hayes (n 51); art 29 Vienna Convention (n 51).

⁵³ Hayes (n 52) 20.

⁵⁴ Bernier (n 50) 171.

⁵⁵ *ibid.*

⁵⁶ See generally Robert B Looper, ‘“Federal State” Clauses in Multilateral Instruments’ (1960) *U Ill L F* 375; Yuen-Li Liang, ‘Colonial Clauses and Federal Clauses in United Nations Multilateral Instruments’ (1951) 45 *AJIL* 108.

⁵⁷ Hayes (n 53) 20.

⁵⁸ *ibid.*

what measure(s), if any, central governments must take to seek compliance of its SFGs at the local level.⁵⁹ In the context of international trade, GATT practice has filled the gap left by the absence of a general customary international law which stipulates the measure (s) to be taken to ensure compliance of federal systems with international trade norms. The GATT practice will be considered in the next section.

2.4.1 History of GATT Measures to Ensure Compliance of Federal Systems.

Brenier points out that at the inception of multilateral cooperation in international relations, the scope of international law was widening and the emerging international instruments during this period started taking into consideration the peculiar problems posed by federal systems.⁶⁰ Thus, the potential conflict arising from the possibility that SFGs in federal systems could act at cross purposes with the treaty obligations of the federal system was foreseen during the negotiation process for the new multilateral trade order in the aftermath of WW2.⁶¹ During the 1946 GATT and ITO preparatory session within the UN, the challenge posed by federal systems to compliance with the proposed GATT was apparent because a number of proposals were put forward by negotiating parties such as Australia and the US, seeking to ensure that compliance by federal systems was guaranteed.⁶²

Hayes reports that:

in response to these concerns, the [UN] technical subcommittee recommended the addition of a clause to the National Treatment article [of the proposed GATT] requiring contracting parties to take ‘all measures’ open to them to ensure that taxes and other regulations by subsidiary

⁵⁹ *ibid.*

⁶⁰ Bernier (n 55) 1.

⁶¹ Hayes (n 59) 20.

⁶² *ibid* 21.

governments within their territories did not impair the objectives of the national treatment article.⁶³

The reference to ‘all measures’ in the proposal of the technical committee was later modified ‘to require each government to “take such reasonable measures as may be available to it” to ensure observance by subsidiary governments.’⁶⁴ Furthermore, the ‘federal clause’ was addnote to a general miscellaneous article presumably in view of the fact that the issue of federal compliance with the proposed multilateral trade agreement affected not only the National Treatment provision but also other substantive provisions of the then proposed GATT.⁶⁵

2.4.2 The Current Position on Federal Compliance under the GATT/WTO System: Article XXIV: 12.

The current position on federal compliance with the WTO/GATT system is expressed in art XXIV: 12. It provides that ‘Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.’⁶⁶ Jackson and Hayes identify that ‘the language of art XXIV: 12 descended directly from language in the draft ITO Charter.’⁶⁷ In addition to art XXIV: 12, there are similar provisions across the GATT/WTO agreements which are modelled after art XXIV: 12.⁶⁸

⁶³ *ibid* 22.

⁶⁴ *ibid*.

⁶⁵ JH Jackson, ‘The General Agreement on Tariffs and Trade in United States Domestic Law’ (1967) 66 (2) *Mich L Rev* 249, 304-306.

⁶⁶ *ibid*.

⁶⁷ Hayes (n 64) 21; Jackson (1967) (n 66) 304.

⁶⁸ For example, art 2.2 Agreement on Subsidies and Countervailing Measures (1994); art XVI (4) Marrakesh Agreement Establishing the WTO; art 13 Agreement on the Application of Sanitary and Phytosanitary Measures (1994); arts 3.1, 3.4 and 3.5 Agreement on Technical Barriers to Trade (1994); art 1.3(a) General Agreement on Trade in Services (1994).

2.4.3 The Ambiguities in the Application of Article XXIV: 12.

The issues relating to the application and effect of federal systems' compliance with GATT/WTO agreements expressed during the negotiation process of the GATT in 1946 did not disappear even with the final agreed version of art XXIV: 12 which was inserted in the GATT 1947. Rather, the historical evolution of this federal compliance clause was marked by unresolved ambiguities regarding the extent and scope of the obligations imposed on federal nation/states to secure compliance by their SFGs.⁶⁹

For example, during the GATT years of the multilateral trade system there were interpretations which suggested that the effect and scope of 'reasonable measures' under art XXIV: 12 were not intended to be compelling or mandatory on the contracting parties to the GATT.⁷⁰ One interpretation suggested by Jackson was that art XXIV: 12 did not apply to measures of SFGs which are constitutionally beyond the powers of the central government. As such, the central government was not in breach of its international obligations if an SFG in the exercise of such powers contravened an international obligation as long as the central government did everything within its power to ensure local observance of GATT.⁷¹ Another interpretation suggested by Jackson was to the effect that the provision of art XXIV: 12 'was not intended to apply as a matter of law against local subdivisions at all, and even when the central government has legal power to require local observance of GATT it is not obligated under GATT to do so but merely to take reasonable measures.'⁷²

During the Uruguay Round which culminated in the introduction of the WTO, negotiating parties sought to clarify the inherent ambiguities in art XXIV: 12 by adopting an Understanding on the Interpretation of art XXIV of the General Agreement on Tariffs and Trade (GATT) 1994. The key point in the Understanding concerning the

⁶⁹ Hayes (n 67) 20-23.

⁷⁰ Jackson (1967) (n 67) 302.

⁷¹ *ibid.*

⁷² *ibid.*

scope of federal compliance under art XXIV: 12 is that ‘Each Member is fully responsible under the GATT for the observance of all provisions of the GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.’⁷³ The Understanding also stipulated that the provisions of the Dispute Settlement Understanding (DSU) ‘may be invoked in respect of measures affecting its observance by regional or local governments or authorities within the territory of a Member.’⁷⁴

Hayes argues that inasmuch as the ‘Understanding on art XXIV: 12 clarifies the responsibility of all GATT/WTO federal nation/states for the non-conforming behavior of their component units under the GATT/WTO, it leaves open the question of what constitutes ‘reasonable measures’ to seek compliance.’⁷⁵ According to him, ‘This is a particularly important question to consider in areas that fall within exclusive regional or local authority.’⁷⁶ Therefore he is of the view that ‘despite the Uruguay Round Understanding on art XXIV: 12, the extent of federal nation/state obligations under art XXIV: 12 remain unclear and what constitutes “reasonable measures” to ensure local observance remains ambiguous.’⁷⁷

This thesis will now consider a number of GATT/WTO cases which have addressed this issue of federal compliance under art XXIV: 12 to ascertain the extent to which they were able to clarify the ambiguities identified above and particularly highlighted by Hayes.

⁷³ Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, XXIV: 12 13. See also Hayes (n 69) 24.

⁷⁴ Hayes (n 73) 25.

⁷⁵ *ibid* 25.

⁷⁶ *ibid*.

⁷⁷ *ibid* 23-24.

2.4.4 GATT Panel Interpretations of Article XXIV: 12.

Case one: Canada-Measures Affecting the Sale of Gold Coins.

The meaning and scope of art XXIV: 12 was first interpreted by a Dispute Settlement Panel during the GATT era in the case of *Canada-Measures Affecting the Sale of Gold Coins*.⁷⁸ A summary of the facts are as follows:

South Africa (SA) took Canada before the GATT dispute settlement panel claiming that a 1983 retail sales tax enacted by the Province of Ontario, Canada on gold coins violated art II and III of the GATT and that Canada failed to carry out its obligations under art XXIV: 12 which required Canada to ensure that its provinces complied with the provisions of the GATT 1947.⁷⁹ SA claimed nullification and impairment of the benefits of the Tokyo Round concession due to the measures of the province of Ontario.⁸⁰ A significant constraint on Canada was that the subject matter of raising revenue through taxation was a provincial prerogative but responsibility for the regulation of trade and commerce in currency and coinage was within the exclusive authority of the Canadian Federal Parliament.⁸¹

The dispute settlement Panel first held that ‘The Ontario sales tax measure violated GATT art 111:2 by subjecting the products of SA to an internal tax in excess of those applied to like domestic products.’⁸² The Panel also examined how art XXIV:12 impacted Canada's obligations under art 111:2 stating that the basic purpose of art XXIV: 12 ‘was to qualify the basic obligation to ensure the observance of the General

⁷⁸ September 17 1985, L/5863 [hereinafter *Canada Gold Coins*].

⁷⁹ *ibid* 2.

⁸⁰ *ibid* 6.

⁸¹ *ibid* 8.

⁸² *ibid* 14; Hayes (n 77) 26.

Agreement by regional and local government authorities in the case of contracting parties with a federal structure.’⁸³

In relation to the controversial issue of the extent of measures taken towards ensuring sub-national compliance by the Canadian central government, the Panel stated that ‘The basic question was whether art XXIV: 12 applies [to] (a) *all measures* taken at the regional or local level or (b) *only to those measures which the federal government cannot control* because they fall outside its jurisdiction under the constitutional distribution of competence.’⁸⁴ In response to these questions, the Panel stated that ‘Article XXIV: 12 applied only to those measures taken at the regional or local level which the federal government cannot control because they fall outside its jurisdiction under the constitutional distribution of competence.’⁸⁵

Furthermore, the Panel highlighted how the interpretation given to art XXIV: 12 had the potential of creating an imbalance in the obligation requirements of federal and unitary states.⁸⁶ The Panel argued that only an interpretation of art XXIV: 12 which does not limit the *applicability* of the provisions of the General Agreement but merely limits the obligations of federal States to secure their *implementation* would achieve a balance between federal and non-federal states.⁸⁷

In the specific context of the dispute between the two parties in this case, the Panel considered whether Canada fulfilled its obligation to take ‘such reasonable measures as may be available to it’ to ensure Ontario's observance of art 111:2.⁸⁸ SA had argued that Canada could have referred the matter to the Canadian Supreme Court and its failure to do so amounted to a violation of its obligations to take ‘reasonable measures’ under art

⁸³ *Canada Gold Coins* (n 82) 52; Hayes (n 82) 26.

⁸⁴ Hayes (n 83) 26.

⁸⁵ *Canada Gold Coins* (n 83) 15.

⁸⁶ *Canada Gold Coin* (n 85) 17.

⁸⁷ *ibid*; Hayes (n 84) 27.

⁸⁸ Hayes (n 87).

XXIV: 12.⁸⁹ Canada countered this argument stating that ‘art XXIV: 12 reserved to each contracting party the right to determine on its own whether a measure was reasonable.’⁹⁰ Canada's argument was rejected by the Panel which ruled that in ascertaining which measures were reasonable within the meaning of art XXIV: 12 for securing the observance of the provisions of the General Agreement, ‘The consequences of the non-observance by the local government for trade relations with other contracting parties are to be weighed against the domestic difficulties of securing observance.’⁹¹ The Panel considered the negative trade implications of the Ontario measure against the domestic difficulty which Canada faced in securing observance of art 111: 2 by Ontario and held that it could not determine whether Canada referring the issue to the Supreme Court would have in the circumstances constituted a reasonable measure.⁹²

In its final recommendation, the Panel held that Canada was to compensate SA for lost competitive opportunities due to the Ontario measure and further recommended that Canada continue to take ‘such reasonable measures as are available’ to secure observance by Ontario.⁹³ The decision of the Panel was never adopted but the Canada Gold Coins case was significant for exposing the complications inherent in the application of XXIV: 12 to federal systems.

Case two: Canada-Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies

The second GATT Panel case which considered art XXIV: 12 was the *Canada-Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*⁹⁴ which involved the US and Canada. The US claimed in this case that certain practices of

⁸⁹ *Canada Gold Coins* (n 87) 17.

⁹⁰ *ibid.*

⁹¹ *ibid* 18.

⁹² *ibid* 18; Hayes (n 88) 27.

⁹³ *Canada Gold Coins* (n 92) 18.

⁹⁴ DS17/R-39S/27 (October 16 1991) [hereinafter *Canada-Import, Distribution*].

provincial liquor boards in Canada violated GATT art 111.18. The US' complaint focused on the higher price mark-ups applied to imported beer compared with domestic beer and the allowance for private delivery and direct sales systems for domestic brewers, while imported brewers were forced to distribute through the provincial liquor boards.⁹⁵ In regard to art XXIV: 12, the US argued that Canada had not taken 'reasonable measures' to ensure observance of art 111: 4 by provincial liquor boards because the Canadian Parliament had omitted to utilise its power to impose discipline on the liquor boards.⁹⁶ In response to this claim, Canada argued that 'the determination of what is 'reasonable and available' under art XXIV: 12 must take into account the domestic legal and political situation and ultimately should be judged by the contracting party itself.'⁹⁷ The Panel rejected this argument stating that 'The GATT and not the contracting parties would be the ultimate judge of whether reasonable measures had been taken.'⁹⁸ The Panel noted that for Canada to be regarded as having taken 'reasonable measures' it would have to 'show that it had made *a serious, persistent and convincing effort*'⁹⁹ to secure compliance by the provincial liquor boards with the provisions of the General Agreement.¹⁰⁰ In this instance, the Panel held that Canada had failed to satisfy this threshold.¹⁰¹

Case three: United States (US): Measures Affecting Alcoholic and Malt Beverages

The next case which concerned the interpretation of art XXIV: 12 is the *US: Measures Affecting Alcoholic and Malt Beverages*.¹⁰² In this case involving the same two parties as

⁹⁵ *ibid* 19-21ff, 25-28.

⁹⁶ *ibid* 185.

⁹⁷ *ibid* 52.

⁹⁸ Hayes (n 92) 28.

⁹⁹ Hayes (n 98) Emphasis added.

¹⁰⁰ *Canada-Import, Distribution* (n 97).

¹⁰¹ *ibid* 53.

¹⁰² DS23/R-39S/206 (March 16 1992) [hereinafter *Alcoholic and Malt Beverages*].

above, ‘Canada requested a GATT Panel to address excise taxes levied on imported beer and wine by US federal and state officials.’¹⁰³ Canada argued that the US federal government and eighteen states maintained lower tax rates or tax credits for in-state and domestic brewers.¹⁰⁴ Canada claimed that this was a violation of GATT art 111:2 ‘The Panel found that the federal and state taxes violated the NT under GATT art 111:2.’¹⁰⁵ Interestingly, the US reversed its line of arguments which it used in the previous *Canada-Import case* stating that ‘Article XXIV: 12 could be invoked by countries with federal constitutional systems as a limitation on their duty to bring local laws into compliance with GATT.’¹⁰⁶ Canada countered this argument stating that the US had ‘an obligation to compel local observance of the GATT, relying in part on one scholar’s view that the US constitutional system allows the federal government to preempt state law and therefore compel state adherence to GATT.’¹⁰⁷ The Panel agreed with Canada’s position stating that there was no constitutional impediment to forcing state compliance. It further noted that ‘Under US constitutional law GATT law is part of US federal law and being based on the Commerce Clause of the Constitution, overrides, as a general matter, inconsistent state law.’¹⁰⁸

In relation to reasonable measures, the Panel ruled that the US had failed to present evidence that reasonable measures were unavailable to it in this case.¹⁰⁹

Summarising the effect of the GATT jurisprudence on the scope and meaning of ‘reasonable measures’ under Article XXIV: 12, Hayes argues that ‘other than the

¹⁰³ *ibid* 2- 3; Hayes (n 99) 29.

¹⁰⁴ *Alcoholic and Malt Beverages* (n 103) 80 – 81.

¹⁰⁵ *ibid*.

¹⁰⁶ *ibid* 54; Hayes (n 103) 29.

¹⁰⁷ *Alcoholic and Malt Beverages* (n 106) 54; Hayes (n 106) 29.

¹⁰⁸ *Alcoholic and Malt Beverages* (n 107) 70.

¹⁰⁹ *ibid* 79; Hayes (n 107) 29.

reference in *Canada-Import* to ‘serious, persistent, and convincing effort’ no GATT Panel has discussed what constitutes a "reasonable measure" under Article XXIV: 12.’¹¹⁰

This view is supported in this thesis because the cases have added more confusion than clarity. For example, the *Canada-Import* case built on the principles of the *Canada-Gold Coins* case by addressing the issues of which yardstick was to be used for ascertaining when ‘reasonable measures’ was sufficient and who was responsible for determining these yardsticks. Hayes gives credit to the panels for adopting a ‘serious, persistent and convincing effort’ test as a satisfactory threshold. However, the significance of the reference to this threshold identified by Hayes as a credit to the Panel’s efforts is as elusive as the concept of ‘reasonable measures’ itself. This is because it is a threshold which borders on a subjective evaluation by the GATT Panel in determining what should be deemed ‘serious’, ‘persistent’ and ‘convincing.’ This makes the yardstick for ascertaining reasonable measures taken in each case open to the possibility of varied interpretations. A federal state which was deemed to be condoning a perceived non-compliance measure from its SFGs could have had no clear indication until it is dragged before the GATT Panel what and the extent of the steps it could have taken to satisfy the ‘serious’, ‘persistent’ and ‘convincing’ effort threshold.

Furthermore, at the time these disputes were considered (from the mid-80s to the early 90s), the patterns of international tradewere already changing significantly to accommodate the activities of SFGs in a globalised process of international economic relations. Hence, the threshold of what constitutes ‘serious’, ‘persistent’ and ‘convincing’ was fast becoming blurry and thus an increasingly impossible burden for federal states.

2.5 Regional Trade Agreements (RTAs) and Compliance in Federal Systems.

The reference to the nomenclature Regional Trade Agreements (RTAs) in international trade literature is as contentious as the very concept they represent. Many commentators

¹¹⁰ Hayes (n 109) 30.

have disagreed with this terminology.¹¹¹ According to Mansfield and Milner, ‘A region is often defined as a group of countries located in the same geographically specified area. Exactly which areas constitute regions however remains controversial.’¹¹² On the issue of the relationship between economic flows and policy choices amongst the participants in such species of trade agreements, commentators have made distinctions between ‘regionalism’ and ‘regionalisation.’ Mansfield and Milner relying on the distinction set forth by Fishlow and Haggard, are of the view that regionalisation refers to the regional concentration of economic flows while regionalism is a political process characterised by economic policy cooperation and coordination among countries.¹¹³ Also, Katzenstein is of the view that ‘Regionalisation describes the geographic manifestation of international or global economic processes, while Regionalism refers to the political structures that both reflect and shape the strategies of governments, business corporations and a variety of non-governmental organisations and social movements’¹¹⁴

2.5.1 RTAs in International Trade.

Interestingly, RTAs are not new to the international economic scene. According to the WTO World Trade Report, ‘Empires were one of the earliest means of securing trade interests. Powerful states – from the Romans to the Ottomans, to the British – used influence and force to create colonial empires or “spheres of influence” that gave their traders and manufacturers secure access to foreign markets, often on an exclusive basis.’¹¹⁵ However, since the inception of the multilateral trade system in 1947, they have been regulated under the rubric of the Multilateral Trade Agreements.¹¹⁶ In the

¹¹¹ Edward D Mansfield and Helen V Milner, ‘The New Wave of Regionalism’ (1999) 53(3) IO 589, 590.

¹¹² Mansfield and Milner (n 111) 591; Matsushita and others (n 39) 548 - 549.

¹¹³ Mansfield and Milner (n 112) 591.

¹¹⁴ Peter J Katzenstein, ‘Regionalism and Asia’ (2000) 5 (3) New Pol Econ 353, 354.

¹¹⁵ WTO Report, *The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (WTO Publications 2011) 49.

¹¹⁶ See art XXIV GATT 1947 (n 37); art V GATS (n 37); The Enabling Clause Decision GATT Contracting Parties, Decision of November 28, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation on Developing Countries

Westphalian era of international relations, the complexity of RTAs increased within the context of the prevailing political and economic circumstances in the development of the international system at every point in time.

As pointed out earlier in this chapter, the international economic order has in the recent past witnessed an exponential increase in the use of RTAs. Ruggiero, a Former Director-General of the WTO, identifies the aftermath of the Uruguay Round of multilateral negotiations as the inception of this trend. He states that:

...at the conclusion of the Uruguay Round negotiations, multilateralism appeared triumphant as the WTO moved decisively away from the old GATT's image as a Rich Man's Club toward universal membership. Ten years later, only three of WTO's 147 member governments are not part of any regional or preferential trade agreement and only one of these – at last count – was not involved in a negotiation aimed at creating an FTA.¹¹⁷

It is evident from the above quote by Ruggiero and recent statistics from the World Trade Organisation - which puts the number of RTAs in operation by 2011 at 297 - that the use of RTAs is a phenomenon which is increasing in geometric proportions and as a consequence has serious implications on the regulation of international trade.¹¹⁸

The factors which drive the RTA practice of countries are pluralised and more importantly, are very potent in determining their trade policy directions. In theory, economic considerations are usually perceived as the main objective of RTAs. However,

<http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#enabling_clause> assessed 29 July 2010.

¹¹⁷ Cited from AL Stoler, 'Preferential Trade Agreements and the Role and Goals of the World Trade Organization' (Conference on Free Trade Agreements in the Asia-Pacific Region: Implications for Australia, Perth, July 2004) 1. See also Robert Lawrence, *Regionalism, Multilateralism, and Deeper Integration* (Brookings Institution 1996) 6.

¹¹⁸ See chapter one, section 1.1.1 at 'n 31.' See also WTO website <http://www.wto.org/english/tratop_e/region_e/region_e.htm> accessed 13 May 2010.

the reality of the situation shows that there are other factors at play. These factors include inter alia economic and political-economic/national security considerations.¹¹⁹

RTAs are by nature predominantly economic constructs. The participants to these trade agreements usually seek to achieve an objective(s) related to the integration of a specific sector or all sectors of the respective economies of the participants to the RTAs. Corttier and Foltea are of the view that ‘The economic rationale for concluding preferential agreements includes the search for larger markets and for deeper integration, in particular among neighbouring countries.’¹²⁰ Thus, the formation of a Custom Union (CU) or a Free Trade Agreement (FTA) in economic terms entails the removal of barriers to trade between the participants of these arrangements. Flowing from this, a major rationale why countries enter into an RTA in economic terms is because theoretically they are meant to be welfare enhancing for the participants to the arrangement.

Also, RTAs were recommended at the inception of the GATT system in 1947 because it was envisaged that they would serve as building blocks for the multilateral process.¹²¹ However, recent literature and studies have cast doubts on the welfare implications of RTAs and their ability of to act as building blocks to the multilateral system. Some commentators have argued that RTAs – especially the new styled aggressive FTAs - constitute stumbling blocks to the multilateral trade system.¹²² Others have argued that RTAs are acting as anticipated under the WTO agreements because they are aiding the expansion of liberalisation tenets in subject areas –such as competition policy - which

¹¹⁹ Raj Bhala *International Trade Law: Interdisciplinary Theory and Practice* (3rd edn, Lexis Nexis 2008).

¹²⁰ Thomas Corttier and Marina Foltea, ‘Constitutional Functions of the WTO and RTAs’ in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2010) 45.

¹²¹ Jacob Viner, ‘The Economics of Customs Unions’ in *The Customs Unions’ Issue* (Carnegie Endowment for International Peace 1950) reproduced in Freund (ed) (n 36) 41-81.

¹²² Chad Damro, ‘The Political Economy of Regional Trade Agreements in Bartels and Ortino (eds) (n 120) 24.

have proved difficult to achieve under the multilateral trade system.¹²³ In relation to the welfare creation attributes of RTAs, Do and Watson are of the view that the proliferation of RTAs does not yet seem to have created a world trade system dominated by trade diversion.¹²⁴ Whichever way the debate has gone, one undisputed fact is that the current resurgence of the use of RTAs in international trade in terms of its economic implications has had momentous and serious implications for the international trade system which make it obvious that it would take more than economic factors to have kept the RTA resurgence burning.

Due to the uncertainty surrounding the economic benefits of RTAs as a platform for international trade, it has become obvious that some collateral albeit important political factors play a fundamental role in promoting RTAs to countries within the international system.¹²⁵ However, considering that RTAs are primarily economic agreements, their formation is never directly attributed to political considerations – hence the term political economy – which supposes that political factors act as indirect stimulants for participation in RTAs.

National security is also subsumed under this heading because although national security has taken on a new dimension, especially since the increased terrorist attacks on the US and her allies; it is still a political issue which like other mainstream political considerations has become a significant inspiration for RTA formation. Damro explains this point, stating that countries enter into RTAs in a bid to achieve security objectives via the economic construct of RTAs.¹²⁶ He points out that while economic objectives are

¹²³ Ildikó Virág-Neumann, 'Regional Trade Agreements and the WTO' (International Conference on Management, Enterprise and Benchmarking, Budapest, June 2009) 381, 384; Carsten Fink and Marion Jansen, 'Services Provisions in Regional Trade Agreements: Stumbling or Building Blocks for Multilateral Liberalization?' (Conference on Multilateralising Regionalism, Geneva, September 2007) 6, 18; Won-Mog Choi, 'Defragmenting Fragmented Rules of Origin of RTAs: A Building Block to Global Free Trade' (2010) 13 (1) JIEL 111, 114.

¹²⁴ William Watson and Viet D Do, 'Economic Analysis and Regional Trade Agreements' in Bartels and Ortino (eds) (n 122) 16 – 17.

¹²⁵ Cortier and Foltea argue that when comparing the motives for which countries enter into the WTO and RTAs respectively, that the motives for joining RTAs are often related to non-economic reasons while the reasons for joining the WTO are more related to economic reasons. Cortier and Foltea (n 120) 44-47.

¹²⁶ Damro (n 122) 30.

the central reason for signing an RTA, a country could attain an equally important political objective of achieving security within the designated RTA participating area for the participants to the agreement. This is due to the expectations that an RTA will stimulate confidence especially in regions where the need for confidence security wise is urgently needed. According to Darmono, regions which have histories of conflict and lack of erstwhile cooperation may look to economic cooperation as a means of initiating a relationship which can ease the security tension in such a region. He cites the European Union (EU) as an example of an RTA which was formed in such a manner.¹²⁷

Similar to the position between the multilateral trade regime and federal systems, RTAs have become increasingly important in the federalism-international trade discourse because of their growing prominence in recent years. The objective in this section of the chapter is to identify how the use of RTAs in international trade impacts the participation of federal systems in the international economic system.

The next section will focus on the relationship between federal systems and RTAs so as to establish the extent to which the activities of SFGs are compatible with them (RTAs).

2.6 RTAs and Compliance in Federal Systems.

The compatibility issues discussed in the previous section on multilateralism are also present in the relationship between RTAs and federal systems. More importantly, with the exponential increase in the use of RTAs as a platform for international trade participation, it has become pertinent to examine how RTAs have responded to the participation of federal systems in international trade.

There are numerous RTAs in existence and the contents of each RTA vary depending on the scope of the agreement and the parties involved. Thus, it is difficult to identify one single RTA which fully captures the compatibility issues between federal systems and RTAs. This section will focus on the North American Free Trade Agreement (NAFTA)

¹²⁷ *ibid* 31. FTAs which have been formed predominantly as a security stimulant is the US-Israel FTA which was formed in 1985 in a bid to douse growing security tensions which was brewing between both nations during that period.

as an example just to demonstrate these issues relating to federal systems and RTAs. The choice of NAFTA is informed by the fact that it was the first of its kind to involve developing and developed countries; it also involved three federal systems. Finally, it has been the subject of important investment disputes which demonstrate the growing impact of SFGs on the operation of international economic norms in federal systems.

Art 105 contains the federal compliance clause of NAFTA. It provides that '[T]he Parties *shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement*, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.'¹²⁸ This provision originated from art 103 of the US-Canada Free Trade Agreement ("CFTA").¹²⁹

Art 105 is also similar in wording to the GATT art XXIV: 12, but a significant difference is the shift in emphasis from '*shall take such reasonable measures as may be available to it*' to '*shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement*.' The language of NAFTA is stricter than the GATT in its requirement for federal systems. According to Vengroff and Rich, citing Dupras, 'This language implies that Canada is obligated to perform and that unless the Canadian government could implement each and every provision in NAFTA, it would be in default and could be subject to an application for dispute settlement.'¹³⁰

Hayes argues that in contrast to the GATT, 'the "all necessary measures" language in NAFTA Article 105 ...eliminates the ambiguities of the "reasonable measures" language in GATT Article XXIV: 12.'¹³¹ According to him, 'the "all necessary measures" language can reasonably be interpreted to impose a requirement on federal states to do *whatever it takes* within its constitutional authority to ensure state compliance.'¹³² The

¹²⁸ Emphasis added.

¹²⁹ Hayes (n 110) 31.

¹³⁰ Vengroff and Rich (n 21) 11- 12.

¹³¹ Hayes (n 129) 31.

¹³² *ibid* 31.

reference to ‘whatever it takes’ by Hayes is not as definitive on the matter as it sounds. This is because in reality ‘whatever it takes’ is difficult to achieve. As Hayes later points out, when central governments are faced with negative fallouts due to the activities of their regions, rather than follow a hard line to ensure compliance of its regions as stipulated under art 105, they may rather seek political compromise or take the option of paying monetary compensation to aggrieved trading partners as an alternative policy action. This approach has become necessary because the role of SFGs in the implementation of international economic agreements is increasing due to the encroachment of expanding international trade and investment issues into their constitutional domain.¹³³ As such, pursuing a hardline stance has the potential to foster more dissident action by SFGs especially if they regard the action of the central government against their international activities as a suppression of their constitutional freedom and/or economic development objectives.

Furthermore, actualising a ‘whatever it takes’ approach of art 105 in reality is dependent on how clearly constitutionally delineated international trade and investment powers are between levels of government in a federal system. In the case of federal systems with loose constitutional demarcations such as Canada, it will be difficult to achieve a comprehensive compliance rate with NAFTA as stipulated under art 105 because the constitutional designation on foreign policy in Canada is ambivalent. This constitutional uncertainty (especially when the issues in question fall within the constitutional competence of the Canadian provinces) is enough to justify an excuse on the part of Canada that it is not always possible to achieve compliance of all its SFGs in line with requirements of art 105. However, in federal systems with clear constitutional demarcations on foreign trade policy such as in the US, it is more difficult for the central government to justify the actions of its SFGs which impede on its obligation to ensure compliance with NAFTA.

The position in Nigeria –the case study – is more aligned with the US example. These circumstances highlighted above do not include situations where SFGs are acting within

¹³³ This changing dynamics of international economic norms will be considered in detail in the next chapter.

jurisdictional grey areas or actually encroaching into the exclusively designated areas for the central governments.¹³⁴ These emerging situations will be addressed in the next chapter, where the dynamics of a new dispensation of international economic relations will be examined.

Though there are no GATT/WTO cases in this area, but there are a number of foreign investment cases which have directly or indirectly considered the scope of art 105 of NAFTA. One of these cases will be considered in the next section to highlight how federal compliance clauses in RTAs affect federal systems.

Metalclad Corporation v The United Mexican States¹³⁵

This was a foreign investment dispute which arose out of the activities of a US company - Metalclad Corporation in the Municipality of Guadalcázar located in the Mexican State of San Luis Potosí (SLP). Metalclad alleged that the Respondent (Mexico) through its regional government had interfered with its investment - the development and operation of a hazardous waste landfill. The Government of Mexico had issued federal construction and operating permits for the landfill prior to Metalclad's purchase of COTERIN (the Mexican company which obtained the original permit to build the waste landfill) and the Government of SLP likewise issued a state operating permit which implied its political support for the landfill project.¹³⁶ However, the Municipality of Guadalcázar became a stumbling block to Metalclad's investment when it demanded that Metalclad obtain an additional municipal permit before the construction of waste landfill could commence. Metalclad claimed that this interference was a violation of a number of Chapter Eleven investment provisions of NAFTA. The main focus was on Art 1105 which requires each party to NAFTA to 'accord to investments of investors of another Party treatment in accordance with international law, including fair and

¹³⁴ Daniel Abebe and Aziz Huq, 'Foreign Affairs Federalism: A Revisionist Approach' (2013) 66 (3) Vand L Rev 723, 726.

¹³⁵ (2000) Case No Arb (AF)/97/1 [hereinafter *Metalclad case*].

¹³⁶ *ibid* para 79.

equitable treatment and full protection and security.’¹³⁷ However, a prominent question which arose in this dispute was whether Mexico was internationally responsible for the acts of its regions (SLP and Guadalcázar) pursuant to art 105.¹³⁸ The International Centre for Settlement of Investment Disputes (ICSID) Panel held that Mexico had violated its obligation under art 1105 and international law because Metalclad’s investment was not accorded fair and equitable treatment due to the interference of the regional governments.¹³⁹ The Panel argued that Guadalcázar’s insistence on a permit being obtained by Metalclad was an impediment to the objectives of NAFTA which is to promote and increase cross-border investment opportunities and ensure the successful implementation of investment initiatives.¹⁴⁰

The Panel stated that Metalclad had proceeded with its investment on the strength of the assurance that obtaining federal and state permits was a sufficient requirement to proceed with the investment. Thus, the Panel held that the subsequent interference by the Municipality of Guadalcázar with Metalclad’s investment was a failure on the part of Mexico which had a responsibility ‘to ensure a transparent and predictable framework for Metalclad’s business planning and investment.’¹⁴¹ The Panel also stated that the failure of Mexico to guarantee the adherence of its internal law with the requirements of NAFTA, art 1105(1) was supported by the ‘governing principle that internal law (such as the Municipality’s permit requirements) does not justify failure to perform a treaty...’¹⁴²

From the forgoing, it can be argued that the participation of Mexico’s SFGs in the operation of NAFTA’s foreign investment regime was interpreted as being contrary to the provisions of art 1105 and in effect art 105. However, this decision is not definitive

¹³⁷ *ibid* para 74.

¹³⁸ *ibid* para 73.

¹³⁹ *ibid* para 74.

¹⁴⁰ *ibid* para 75; see also NAFTA art 1102(1).

¹⁴¹ *Metalclad case* (n 140) para 99.

¹⁴² *ibid* para 100.

on the issue of federal compliance with regional trade agreements because the circumstances of this case may have been different if Guadalupe had not proved difficult in granting a permit to Metalclad. In essence, it is not clear if the Panel in this case was generally adverse to the jurisdiction of the Mexican Municipality to grant permits as a contravention of NAFTA and international law or whether it was only concerned about the adverse consequences which arose when the Municipality refused to grant a permit in this instance. The former view can be interpreted to mean that art 105 NAFTA is not adverse to SFGs having powers to affect the international investment regime under NAFTA as long as these powers are exercised in a manner which does not act as an impediment to the overall objectives of NAFTA especially under art 1105. The latter view supports an argument that art 105 NAFTA is adverse to any form of power wielded by SFGs which has the potential to affect investment under NAFTA. This interpretation will suppose that art 105 does not encourage the ability of SFGs to exercise any powers in the international trade and investment sphere. Thus, the decision in Metalclad can be viewed as an instance which is instructive for demonstrating the consequences of SFGs acting in a manner which is adverse to the objectives of the central government in the operation of an RTA. From this perspective, this case highlights the potential problems which are associated with the involvement of SFGs in international economic agreements.

In the context of the relationship between federal systems and international trade regimes, this case demonstrates that the 'all necessary measures' approach under art 105 does not discountenance the capacity of SFGs to challenge the effect of international economic agreements which have direct implications on their areas of constitutional competence. It also demonstrates the stricter threshold for validity applied to the activities of SFGs under NAFTA. However, it nonetheless demonstrates that art 105 has not fared any better than the GATT XXIV: 12 in providing a definitive objective criterion for ensuring a level playing field between federal systems and unitary systems in international trade relations.

2.7 Conclusion.

As an introductory chapter, the arguments presented were aimed at establishing a foundational premise in the thesis which will be expanded upon in subsequent chapters.

In this chapter, it has been argued that Federalism can be viewed as a process which is constantly evolving to accommodate changing dynamics in the relationship between the components of the federal relationship. It was also argued that SFGs and the central governments in a federal process are constantly jostling for competence on an array of issues which are of common interest to the federal union. Furthermore, it was established that foreign policy (including international economic relations) is an area where the central government in federal systems have traditionally enjoyed plenary powers to the exclusion of SFGs in the federal process. It was pointed out in this chapter that international law has traditionally accorded little recognition to SFGs in the interaction of states in the international system. This similar pattern was identified in international economic regimes such as the multilateral and regional trade systems. To demonstrate this point, the GATT/WTO and RTA legal provisions and case law which portray an adverse attitude to the interference of SFGs in international economic relations were considered.

In summary, this chapter considered the interaction of federal systems with international trade norms with a view to highlighting the compatibility issues inherent in this relationship. The aim was to demonstrate the challenges which the peculiarities of the federal process pose to the application of these international economic regimes in federal systems. To this end, this chapter examined the different approaches adopted under the multilateral and regional trade systems in order to ensure compliance of SFGs in federal systems with international trade norms. From the analysis, it is evident that the federal compliance approach adopted under GATT and NAFTA places federal systems in a peculiar position in international economic relations. This peculiar position is reflected in the ambiguous wording of the federal compliance provisions under GATT and NAFTA and the ensuing case law. This adverse position towards the participation of SFGs in international economic relations will be examined in detail in the course of this thesis with Nigeria as the selected case study.

Chapter Three: The Dynamics of a New Dispensation in International Economic Relations.

3.1 Introduction.

The previous chapter focused on the relationship between federal systems and international economic norms, using the international trade regulatory regimes – multilateralism and regionalism, as the main basis for this analysis. It was outlined in chapter two how the mechanism for compliance of federal systems under these two trade regimes has evolved in response to the peculiar characteristics of the federal process.¹ Chapter two was concluded with a finding that the federal compliance approaches adopted under international trade agreements such as GATT and NAFTA are adverse to the participation of SFGs in the international trade process. This position is reflected in the ambiguous wording of the federal compliance provisions under GATT, NAFTA and the ensuing case law.

The objective in this chapter is to establish how changing geopolitical circumstances in international relations coupled with an evolving relationship between multilateralism and regionalism have impacted on the institutional structure for international economic relations.

3.1.1 The Scope of the Chapter.

With the increased proliferation of RTAs since the early 1990s, the focus of most investigations on multilateralism and regionalism has been on the impact of the ‘new regionalism’ on the multilateral trade system.² For example, the view from the UNCTAD is that ‘In terms of the international trading system, the concern is that the proliferation of RTAs may lead to erosion and possible fragmentation of the multilateral trading system into some kind of federal system composed of semi-

¹ See chapter two, section 2.2.

² For in-depth write-ups on the relationship between the new regionalism and the multilateral trade system, see generally Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2010). See also Frederick M Abbott, ‘A New Dominant Trade Species Emerges: Is Bilateralism a Threat?’ [2007] JIEL 571; Lena Lindberg and Claes G Alvstam, ‘The Ambiguous Role of the WTO in Times of Stalled Multilateral Negotiations and Proliferating FTAs in East Asia’ (2012) 17 Intl Negot 163, 163–187.

autonomous “stumbling” trading blocs.’³ This study considers a different perspective to the issue, which is, how the relationship between the ‘new regionalism’ and the multilateral trade system affects the institutional configuration of federal systems in relation to international trade participation. This important question provides the background context within which the allocation of constitutional powers between central governments and SFGs on matters of international economic relations is considered in this thesis.

Different discussion points have emerged from the evolving relationship between multilateralism and regionalism in the international trade system. Extensive research has been carried out with a focus on the impact of regionalism either as a stepping stone or a hindrance to the multilateral system.⁴ Other scholars have focused on the ways in which coherence can be achieved between the two competing systems of international trade.⁵ Another dimension to the scholarship has centred on the emergence or otherwise of a constitutional order in the international trade system.⁶ This chapter will address this point, albeit in a limited sense. Specifically, awareness about some of the arguments for and against the existence of a constitutional order in the international trade system will be useful in this chapter, because it is significant evidence which outlines distinct characteristics of the current dispensation of international economic relations.

The scope of the arguments in this chapter will be focused on highlighting the evidence which points to the emergence of a new dispensation of international

³ Philippe De Lombaerde and Luk Langenhove, ‘Developing Countries’ Participation in Regional Integration: Trends, Prospects and Policy Implications: UNCTAD’ in Philippe De Lombaerde and Luk Langenhove (eds), *Multilateralism, Regionalism and Bilateralism in Trade and Investment* (Springer 2006) 7. For in-depth studies on this perspective of the multilateralism – regionalism relationship see generally Chad Damro, ‘The Political Economy of Regional Trade Agreements in Bartels and Ortino (eds) (n 2) 24; William Watson and Viet D Do, ‘Economic Analysis and Regional Trade Agreements’ in Bartels and Ortino (eds) (n 2) 16 – 17.

⁴ The scholarships on these debates are considered in chapter two, section 2.5.

⁵ See WTO Report, *The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (WTO Publications 2011) 164 – 196; Henry Gao and Chin Leng, ‘Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a “Common Good” for RTA Disputes’ [2008] JIEL 899; Matthew Schaefer, ‘Ensuring that Regional Trade Agreements Complement the WTO System: US Unilateralism a Supplement to WTO Initiatives?’ [2007] JIEL 585.

⁶ The ‘constitutionalisation debate’ was introduced in chapter two, section 2.3.2. It will be further addressed in this chapter in section 3.3.2 infra.

economic relations which has a 'contraction effect' on the allocation of powers in federal systems in their participation in the world economy. 'Contraction effect' is used in the context of the shrinking foreign affairs powers of the central government due to the intrusiveness of the expanding scope of international economic regimes.⁷ It is argued that due to the characteristics of the international economic system in the current dispensation, the role of central governments as the embodiment of the sovereign status of nation-states on matters of international economic relations is diminishing.⁸

The issues which will be considered in this chapter include:

1. Globalisation as a facilitator of changing patterns in the relationship between multilateralism and regionalism in international trade
2. The effect of the new wave of regionalism on the dynamics of international trade participation
3. The distinguishing characteristics of the current dispensation of international economic relations.

There is a broader context of evolution in the international system which has facilitated the changes occurring in the international economic system. For example, it is pertinent to recognise globalisation as a major geopolitical change which has redefined international relations in the 21st century. Globalisation has served as a facilitator for an expansion in the scope of international economic norms and the consequential incursion of these norms into the domestic policy arena of federal systems.

⁷ This concept is based on the 'disaggregation of the state' theory developed by Slaughter. See Anne-Marie Slaughter, 'The Real New World Order' (1997) 76 (5) *Foreign Affairs* 183, 184ff 194-195. See also Edward T Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (2004) 25(1) *Nw J Intl L & Bus* 1.

⁸ For a summary of the arguments which suggest that the orthodox view of central exclusivity in foreign relations is questionable in light of globalisation and changing notions of sovereignty see JH Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97 *Am J Int L* 782; See generally, JJ Pascoe, 'Time for a New Approach? Federalism and Foreign Affairs after Crosby v. National Foreign Trade Council' (2002) 35 *Vand J Transnat'l L* 291, 306-307.

3.2.1 Globalisation as a Facilitator of the Current Dispensation of International Economic Relations.

Globalisation can be described as a process of expansion in the interactions between peoples in all spheres of human endeavour due to a contraction of geographical boundaries in international relations. It is a significant phenomenon which has reshaped the dynamics of the international system because it has facilitated a reduction in the barriers to transnational relations between actors located in different jurisdictions.⁹

The precise origin of globalisation is difficult to pin point, but it is a concept which has dominated the international relations discourse for most part of the post-industrial revolution era. Eslake¹⁰ is of the opinion that globalisation as a process could be traced further down in history because 'It [globalisation as a process] is simply the logical extension of the tendency towards increasing specialization and trade which has been going on since humans first appeared on the surface of the earth.'¹¹ The manifestation of globalisation in the modern era of international relations is mainly attributed to advancements in science and technology and its impact on the acquisition and dissemination of information.¹²

Most definitions of globalisation focus on the correlation between advancements in the means of economic production and the emergence of new structures and processes of interaction in international relations. For example, the UNESO Management of Social Transformations (MOST) Programme which focuses on the

⁹ See J Isawa Elaigwu, 'Federalism, Regionalisation and Globalisation Africa' (1998) 1 The Federalist 72
<http://www.thefederalist.eu/site/index.php?option=com_content&view=art&id=219&lang=en&Itemid=27> accessed 26 May 2014.

¹⁰ Saul Eslake, 'Globalisation, Economic Policy and Democracy' (2001) Australian J of Soc Issues 36 (3)
<https://www.anz.com/business/info_centre/economic_commentary/GlobalizationEconomicPolicyDemocracy.pdf> accessed 01 September 2013. Cf: Van Den Bossche believes the origin of globalisation is more recent, originating in the period before the First World War. See Peter Van Den Bossche, *The law and Policy of the World Trade organisation* (2nd edn, CUP 2008) 4. For an in-depth account of the origin and history of globalisation in international relations see Jan Aart Scholte, 'Globalisation and the Rise of Super Territoriality' in Guy Lachapelle and Stéphane Paquin (eds), *Mastering Globalisation: New Sub-States' Governance and Strategies* (Routledge 2005) 14-17.

¹¹ Eslake (n 10).

¹² Van Den Bossche (n 10) 4-5; Elaigwu (n 9); Scholte (n 10) 25.

relationship between globalisation and governance defines globalisation as ‘...as a set of economic, social, technological, political and cultural structures and processes arising from the changing character of the production, consumption and trade of goods and assets that comprise the base of the international political economy.’¹³ Furthermore, *Penguin Dictionary of Economics* defines globalisation as ‘The geographical dispersion of industrial and services activities (for example, research and development, sourcing of inputs, production and distribution) and the cross-border networking of companies (for example through joint ventures and the sharing of assets)’¹⁴ These two definitions focus on the relationship between the emerging structures and the changing character of key aspects of international relations such as economic production and trade. These definitions do not represent the full spectrum of the concept of globalisation because there are other explanations for the emerging structures and processes which are not related to economic factors. Eslake argues that definitions of globalisation which focus on economic factors as the sole determinant of ‘geographic dispersion’ and ‘cross-border networking’ being experienced in the globalisation era are narrow conceptualisations of the globalisation process.¹⁵ According to him, ‘geographical dispersion’ has also been experienced by (for example) sporting and cultural activities as well as industrial or services activities.¹⁶ ‘Cross-border networking’ has involved not just companies but educational institutions, governments and non-government organizations and ideas and fashions have been important agents of ‘geographical dispersion.’¹⁷

This shows the multifaceted dimension of globalisation and how difficult it is to attain a definition or understanding which totally encompasses all its dimensions.¹⁸

¹³ UNESCO Management of Social Transformations (MOST) Phase I Globalisation Study < <http://www.unesco.org/most/globalisation/Introduction.htm>> accessed 01 September 2013.

¹⁴ G Bannock and others (eds), *The Penguin Dictionary of Economics* (6th edn, Penguin 1998) 176-177.

¹⁵ Eslake (n 11).

¹⁶ *ibid* 1.

¹⁷ *ibid*.

¹⁸ See generally Deborah Z Cass, *The Constitutionalisation of the World Trade Organisation: Legitimacy, Democracy, and Community in the International Trading System* (OUP 2005) 70; Scholte (n 12) 16.

However, in the words of Pascal Le Merrer, ‘Our view of globalisation is very much influenced by the angle from which we approach it.’¹⁹ So, in the context of this investigation which focuses on the effect of the evolving relationship between multilateralism and regionalism on the institutional participation of federal setups in international trade, these definitions of globalisation proffered above are useful. They highlight the significant role which the economic dimension of globalisation has played in the emergence of new political economy structures in international economic relations. In essence, economic considerations are not the only aspect of globalisation, but they are a significant aspect which is relevant to the objectives of this thesis.

It is also useful to point out that in a period of international relations which has been largely influenced by a capitalist political economy philosophy; globalisation is usually associated with neo-liberal tenets which do not support the interference of government in the functioning of the market. Kotz points out that under a neo-liberal framework of globalisation, ‘The state is assigned a very limited economic role: defining property rights, enforcing contracts, and regulating the money supply,’²⁰ Even ‘state intervention to correct market failures is viewed with suspicion on the ground that such intervention is likely to create more problems than it solves.’²¹ This perception of globalisation brings into question the need for studying institutional forms of regulation in the globalisation - international economic relation nexus.

However, the view in this thesis is that a study of the dynamics of institutional interactions in a global economic dispensation is justified because a *laissez faire* conceptualisation of international economic relations in a globalised era is not a universally accepted position; even amongst neo-liberal scholars. For example, moderate neo-liberals do not share the same stringent views against government intervention as the radical neo-liberal scholars. Moderate neo-liberals believe that globalisation leads to extensive cross-border flows of trade and investment which do

¹⁹ Forward Note to the OECD report by J Huwart and L Verdier, *Economic Globalisation: Origins and Consequences* (OECD Publishing 2013).

²⁰ DM Kotz, ‘Globalisation and Neo-liberalism’ (2002) 12(2) *Rethinking Marxism* 64

²¹ *ibid* 64.

not eliminate positive and negative externalities, or the need for state interventions in response to them.²²

This moderate view is supported in this thesis because it shows that even in a *laissez faire* dominated era of international economic relations; government regulation of markets is not an obsolete consideration.²³ It has even been argued that the failure of some areas of the international economic system such as the international financial system (which experienced a recession in 2008) is a consequence of inadequate regulation of the financial markets in the first place.²⁴ Thus, studying patterns of institutional regulation in the process of globalisation is still an important consideration for rationalising the changing landscape of international economic relations.²⁵

In the area of international trade participation and regulation, the process of globalisation has revolutionised the process and methods of conducting international trade. In the context of the multilateral and regional trade system, the expansion in global interaction has opened up more opportunities for participation in international trade. This in turn has necessitated international cooperation and regulation of the expanding scope of international trade relations under the auspices of the WTO and more recently RTAs. For example, the expansion in the scope of the WTO's competence into new disciplines such as services can be tied to a relaxation of the barriers to mobility of labour.²⁶ The internationalisation of the provision of services

²² *ibid* 78.

²³ See Jackson (2003) (n 8) 799. Jackson citing Douglass North and Ronald Coase is of the view that 'markets will not work unless there are effective human institutions to provide the framework that protects the market function.' See Slaughter (n 7) 184. Slaughter argues that 'private power is still no substitute for state power.'

²⁴ Paul Schreiner, 'Three Approaches to the Economic Crisis' <<https://www.indybay.org/newsitems/2013/01/24/18730724.php>> accessed 27 August 2013. Schreiner does not discountenance the ability of the market to self-regulate itself neither does he advocate for excessive government intervention. However, he argues that both stringent neo-liberal and moderate neo-liberal frameworks are deficient and should be replaced by a model that 'emphasizes wage-based demand for economic policy and solidarity for social policy.'

²⁵ R Brenner and M Glick, 'The Regulation Approach: Theory and History' http://www.revalvaatio.org/wp/wp-content/uploads/brenner-glick-the_regulation_approach_theory.pdf accessed 2 September 2013.

²⁶ See generally D Roberts and others, 'Service Industries go Global' *Financial Times* (London, 20 August 2003) The authors talk about how services have become internationalised and without barriers

has made services a prominent feature of international economic interaction, necessitating international regulation under regimes such as the WTO. On the regionalism front, a plausible explanation for the increase in cross regional RTAs is that globalisation has reduced the insistence on geographical demarcation as a yardstick for economic integration, making it possible for cross - border economic arrangements.²⁷

Of particular importance to this thesis is the ‘contraction’ effect associated with the globalisation of international economic relations. For example, with the expansion of international trade interactions in a globalised world, international cooperation has become more localised in terms of its scope and actors. According to Keating,²⁸

Globalisation and the rise of transnational regimes, especially regional trading areas, have eroded the distinction between domestic and foreign affairs and by the same token have transformed the division of responsibilities between state and sub-national governments.²⁹

This is arguably a reason for the expanded scope of international economic norms because globalisation has not just opened up opportunities for extended international economic interactions but has also fragmented the domestic policy arena by diversifying the platforms for participation and regulation of economic relations at the local level. This view is supported by the UNESCO MOST study on the governance – globalisation nexus which was carried out between 1997 and 2003.³⁰ It was highlighted in this study that one noticeable impact of globalisation on governance structures is the increasing structural differentiation of goods and assets

using the scenario of the expansion of medical services in a globalised world. See also Van Den Bossche (n 12) 8-9.

²⁷ Jo-Ann Crawford and Roberto V Fiorentino, ‘The Changing Landscape of Regional Trade Agreements’ (2006) WTO Regional Trade Agreements Section Trade Policies Review Division, Discussion Paper No 8 5-6; Edward D Mansfield and Helen V Milner, ‘The New Wave of Regionalism’ (1999) 53(3) IO 589, 591; Peter J Katzenstein, ‘Regionalism and Asia’ (2000) 5 (3) New Pol Econ 353, 354.

²⁸ Michael Keating, ‘Regions and International Affairs: Motives, Opportunities and Strategies’ (1999) 9(1) Reg & Fed Stud 1.

²⁹ *ibid.* see also Elaigwu (n 12).

³⁰ MOST Phase I (n 13). See also Henry Teune ‘Local Responses to the Globalisations of our Era’ in Lachapelle and Paquin (eds) (n 10) 38-42.

which has spread across traditional political borders and economic sectors. This has resulted in transnational and multinational changes, which have a major impact on outcomes in determining issue-areas (for instance, environment, trade and world regulation).³¹ Furthermore, the study highlighted that the transnational impact of international trade interaction may induce global and local actors to be more independent from a traditionally exclusive nation-state decision-making process.³² This means that in addition to the popular view that globalisation has facilitated an outward expansion towards international cooperation, the possibility of an inward contraction effect which encourages localised participation and regulation is also plausible. Hayes, drawing on Slaughter's 'disaggregation of the state' theory, supports this inward contraction effect theory.³³ According to him:

In contrast to the "upward" transfer of sovereign authority from nation-states to international institutions, the "disaggregated state" theory focuses on the "downward" transfer of power from the nation-state to regional and local governments. As nation-states become more interconnected and interdependent, centralized international relations dependent upon central government control decline. This in turn leads to a dilution of central government responsibility and a fundamental shift in the institutional structure of the global system, forcing a re-examination of old constitutional and international norms in light of the new circumstances.³⁴

This view has been greeted with mixed reactions. For example, Warner and Gerbasi do not support the view that globalisation has led to a rescaling of political and economic power from the nation-state downward to state and local governments, through the process of decentralisation.³⁵ Instead they propose a counter-view that globalisation and the intrusion of international regimes into the domestic arena of the

³¹ *ibid.*

³² *ibid.*

³³ Hayes (n 7) 9; Slaughter (n 23) 183.

³⁴ Hayes (n 33).

³⁵ Mildred Warner and Jennifer Gerbasi, 'Rescaling and Reforming the State under NAFTA: Implications for Sub-National Authority' (2004) 28 (4) *Intl J Urban Regional* 858, 858.

nation – state has actually led to an erosion of governmental authority ‘at the sub-national level, while the national level is being reformed to accommodate global economic interests.’³⁶ They argue that ‘A new governance nexus is forming [which is] composed of international agreements [international organisations], nation states and private corporations which enhances the primacy of national over sub-national governance scales.’³⁷

The arguments of Warner and Gerbasi do not however refute the proposition that SFGs are affected by the changing dynamics of international economic relations in an era of globalisation. They in fact accede to the reality that under the current dispensation of international economic relations, SFGs are now ‘encouraged to directly engage global corporations in promoting economic development and public service delivery’. They are only handicapped because they ‘do not have a formal role in crafting the rules that govern these relationships.’³⁸ Interestingly, Warner and Gerbasi concede that irrespective of these challenges to the authority of SFGs, ‘It is at the sub-national level where the contradictions between global competitiveness and public welfare will appear.’³⁹ This indicates that globalisation has played a significant role in altering the dynamics of international economic relations in a manner which directly impacts on the internal distribution of governmental authority between levels of government in a nation-state.

It is argued that this relationship between international economic relations and governance structures in a nation-state is not constrained even by constitutional exclusion of SFGs as Warner and Gerbasi suggest. The view offered in this thesis is that the formal restrictions faced by SFGs are a mirage because in reality SFGs now have opportunities to express themselves on the international scene through side

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid* 860.

³⁹ *ibid.*

tracks and cracks in the existing framework.⁴⁰ Kresl's views are instructive in this regard.⁴¹ He argues that:

National governments have had the mandate to negotiate trade liberalisation and have quite naturally emphasised the aggregated positive results, but for the agreements to be politically acceptable, attention had to be drawn to the wishes and concerns of SNG [SFGs].⁴²

Kresl also draws attention to the reality that even if SFGs do not have formal recognition in the negotiation of international economic agreements, 'Once the agreements [are] implemented, SNG [find] themselves functioning in essentially new economic spaces, with new possibilities for action independent of the national government.'⁴³ He further argues that it has:

become clear to many practitioners and elected officials in SNG throughout Canada, the US and Europe that it is *decisions on their part, perhaps more than on the part of officials at the national level* that will be crucial for the future economic vitality and development of their urban economies.⁴⁴

Thus, he argues that the formal restrictions on SNGs are no longer in effective barriers to their participation in the international market.⁴⁵

⁴⁰ In chapter four specific examples of how SFGs in Nigeria are interacting on the international scene are addressed. Also in chapter five and six, a similar experience in the Indian federal system is considered. See generally, Kripa Sridharan, 'Federalism and Foreign Relations: The Nascent Role of the Indian States' (2003) 27 (4) Asian Stud Rev 463, 478 – 484; Brian Hocking, 'Bridging Boundaries: Creating Linkages: Non-Central Governments and Multilayered Policy Environments' (1996) 11 WeltTrends Nr 36, 43.

⁴¹ Peter K Kresl, 'Sub-National Governments and Regional Trade Liberalisation in Europe and North America' (1994) 17(2-3) J Eur Integration 309.

⁴² *ibid* 310.

⁴³ *ibid*.

⁴⁴ *ibid* (emphasis added). This prediction by Kresl is important in this thesis because it is reflective of the changing tide in the conduct of international foreign policy in the 21st century. This point will be emphasised through the course of this thesis.

⁴⁵ Cf: The views of Hönnige and Panke, who argue that the Committee of Regions in the EU as a consultative committee is not very influential overall, but can, exert influence under certain scope conditions, including the speed with which they produce recommendations, the quality of the

Another interesting point raised by Warner and Gerbasi which is important to this discourse is the argument that international trade agreements such as NAFTA ‘attempt to homogenise legal standards as a means of limiting the flexibility of government at the municipal, state and local levels.’⁴⁶ On the issue of the harmonisation, it is submitted that although harmonisation is a significant attribute of the new dispensation of international economic relations, it is arguable that it does not limit the participation of SFGs. This is because harmonisation which ignores diversity at the lower levels of government (where implementation actually takes place) will struggle to be effective. This view is supported by Kresl in his analysis of the impact of the Single European Act (SEA) on the configuration of powers in EU member states. He argues that ‘[T]he processes of harmonisation and standardisation will themselves generate demands for stronger third tier governments...’⁴⁷ because ‘the EU’s policy forays into areas such as environment, transportation, competition and vocational training for which third tier entities have traditionally had responsibilities, necessitates their cooperation for harmonisation to be effective.’⁴⁸

Using services as an example, the enhancement in the mobility of labour due to the global constriction of geographical boundaries raises concerns which require harmonised efforts but does not contest the role to be played by stakeholders at a regional, national and sub-national level. At the national level, an influx of service providers could lead to population explosion which puts a strain on the economy of the recipient country. It could also lead to competition between local and foreign service providers, which might either boost or kill off the local industry in the recipient country. These issues at the national level in turn necessitate cooperation between countries at a regional level because trans-boundary spill over effects could arise if there is slack regulation amongst geographically contiguous countries. At the sub-national level, regulation has also become vital because it is at this level that the

recommendations and the resonance with the addressees’ prior beliefs. Christopher Hönnige and Diana Panke, ‘The Committee of the Regions and the European Economic and Social Committee: How Influential are Consultative Committees in the European Union?’ (2013) 51(3) J CMS 452, 452–471.

⁴⁶ Warner and Gerbasi (n 39) 860. See chapter two for discussions on the use of federal compliance clauses in international trade agreements.

⁴⁷ Kresl (n 44) 317.

⁴⁸ *ibid.*

real impact of these transnational policies on services is experienced. This level of government is the closest level of governance to the grassroots and their involvement is becoming more important in the multi-layered regulation of services. The consequence of this is that globalisation has necessitated international, regional, national and sub-national regulation in these new areas.⁴⁹

There is also a link between the end of the Cold War and the globalisation process which was discussed in the previous section. According to Hayes,

...there is no question that the post-cold war world has undergone a fundamental shift of traditional power structures with lasting implications on the autonomy of regional and local governments throughout the world. As technology and communication costs decrease and the world becomes increasingly interdependent, the ability of regional and local actors to engage and impact foreign affairs and commerce increases exponentially. Indeed, where most localities used to have sporadic contact with foreign governments, they now have routine contacts and well-established relationships.⁵⁰

The summary of the arguments in this section is that globalisation has facilitated the expansion in the scope of international economic regimes which has made these regimes interrupt the domestic policy arena in nation-states, including at the level where SFGs have competence.

The purpose of these sections has been to examine how changes in geopolitical circumstances of international relations are the foundational premise which has facilitated the expansion of international economic norms. This in turn has created an intrusion into the domestic policy arena of federal systems and as a consequence, a 'contraction effect' has occurred which causes a disaggregation of the nation-state in relation to international economic participation. In the next section, the contributions of the resurgent regionalism to the evolution of these new dynamics in international economic relations will be considered.

⁴⁹ Christopher J Kukucha, *The Provinces and Canadian Foreign Trade Policy* (UBC Press 2008) 3.

⁵⁰ Peter J Spiro, 'Globalisation and the (Foreign Affairs) Constitution' (2002) 63 Ohio St LJ 649, 667-71.

3.3 The Effect of the ‘New Wave’ of Regionalism on the Dynamics of International Trade Participation.

In chapter two, the resurgence of regionalism was analysed and some of the significant characteristics of the new wave of RTAs which were identified include: its wide coverage and scope, its aggressive approach, the diminishing emphasis on geographical contiguity as a yardstick for economic integration, its dynamic structure and the variations in nomenclature.⁵¹ The most pressing question which has arisen from the arrival of the new wave of regionalism has been its effect on the multilateral system of the WTO and on world trade in general.

There is the view that ‘Regional integration initiatives have influenced the multilateral system in a number of ways, particularly in the establishment of rules in areas not yet covered by the WTO or in making clarifications about the operation of WTO rules.’⁵² In the context of this investigation, it is argued that the relationship between the new regionalism and the multilateral trade system has had a significant impact on the dynamics of international economic relations; especially in relation to the permissible actors.

3.3.1 A Shift in the Hierarchy of Norms in the International Trade System.

One way in which the new wave of regionalism has upset the balance of the international trade system by challenging the political hierarchy of norms which was established after WW2.⁵³ This reversal is not legal in nature because the WTO still remains the regulatory framework for the formation of RTAs. However, there is a noticeable shift in priority between the WTO and RTAs which has a significant impact on the current outlook of international economic relations.

At the inception of the multilateral trade system after WW2, the regulation of RTAs was placed under the rubric of the GATT multilateral framework. RTAs were regulated under art XXIV of the 1947 GATT as an exception to from the MFN

⁵¹ See chapter two, section 2.5.

⁵² De Lombaerde and Langenhove (n 3) 8 – 9.

⁵³ See generally section 2.3 in chapter two for the historical evolution of multilateralism in international trade.

requirement of GATT Article I. However, in this new dispensation of international economic relations, Hafez argues that ‘It is no longer possible to view the World Trade Organization (WTO) as a rule and RTAs as the exception.’⁵⁴ This is plausible because the recent trend demonstrates that RTAs are capable of articulating trade rules in areas such as investment and competition policy where the WTO has had minimal success.⁵⁵

Some other reasons for this shift include the fact that that certain trade policy areas that have become of crucial importance to several Members are excluded from the multilateral negotiating agenda.⁵⁶ The previous reference to competition policy is also appropriate here because competition policy has failed to materialise within the WTO Doha Round of negotiations.⁵⁷ In July 2004, the General Council of the WTO decided that it will discontinue the deliberations on the interaction between trade and competition policy (in addition to investment and transparency in government procurement).⁵⁸ As a consequence, RTAs have become an attractive platform for developed countries to promote favourable markets for their investors.⁵⁹ In 2005 Puri, commenting in an UNCTAD Report on competition policy related provisions in RTAs, stated that many RTAs now contain various commitments on competition policy at regional and national level.⁶⁰ These commitments relate to the adoption and enforcement of competition laws between the participants to these agreements.⁶¹ Furthermore, RTAs:

⁵⁴ Zakir Hafez, ‘Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs’ (2003) 79 NDJ Rev 879.

⁵⁵ De Lombaerde and Langenhove (n 52) 9.

⁵⁶ Crawford and Fiorentino (n 27) 16.

⁵⁷ *ibid.*

⁵⁸ See generally, Doha Work Programme Decision Adopted by the General Council on 1 August 2004 WT/L/579.

⁵⁹ Crawford and Fiorentino (n 57) 5.

⁶⁰ P Brusick and others (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) Report on Trade and Competition Issues: Experiences at the Regional Level vii.

⁶¹ Crawford and Fiorentino (n 59) 5, 16.

[A]allow Members to single out trade liberalization with specific markets. They also involve less burdensome negotiations than those at the WTO; especially if among like-minded parties and allow the parties to such agreements to trade according to custom-built regulatory aspects and trade policy disciplines.⁶²

The shift in the status of the RTA system from a subordinate to a coordinated system of international trade can also be attributed to the weak discipline mechanism for RTAs under the multilateral system.⁶³ From the outset, the inclusion of RTAs under art XXIV of the GATT 1947 was contentious because although it was regarded as a potential stepping stone for the attainment of the tenets of the multilateral trade system, it was also recognised as a potential hindrance.⁶⁴ To ensure that RTAs fulfilled their potential as a stepping stone for the attainment of the multilateral ideals, ‘...the provisions of the GATT regarding RTAs stipulated that they should not result in higher barriers to trade with third parties; they should also be ambitious in their scope and result in extensive trade liberalisation.’⁶⁵ These stipulations for the compliance of RTAs with the objectives of the GATT have achieved mixed results. This is because from a perusal of the provisions of the GATT 1994, GATS and the Enabling Clause, there are inconsistencies between the new regionalism and the provisions which seek to bring regionalism in line with the conventional norm of the multilateral trade system. One of such inconsistencies is the variations in the nature of RTAs which have emerged from the original concept under art XXIV. For example, Dukgeun draws attention to the trend in Asian FTAs where modified trade remedy rules which are a departure from the WTO system are now being adopted.⁶⁶

⁶² Robert V Fiorentino and others, *The Changing Landscape of Regional Trade Agreements: 2006 Update* (2006) WTO Regional Trade Agreements Section Trade Policies Review Division, Discussion Paper No 12 26.

⁶³ *ibid.*

⁶⁴ *ibid* 26-27. See generally, chapter two, section 2.5.1 for discussions on the ‘stepping stone’/‘stumbling block’ debate. See also Rémi Lang, ‘Renegotiating GATT Article XXIV – A Priority for African Countries engaged in North-South Trade Agreements’ (2006) ATPC Work in Progress No 33.

⁶⁵ Fiorentino and others (n 62) 27.

⁶⁶ Ahn Dukgeun, ‘Foe or friend of GATT Article XXIV: Diversity in Trade Remedy Rules’ (2008) 11(1) JIEL 107, 109.

A specific example of such an FTA is the ‘new age’ partnership agreement between the Japan-Singapore FTA (JSEPA) with its ‘focus on the services sector liberalisation and in the promotion of foreign direct investment between the two countries.’⁶⁷ SM Thangavelu and M Toh point out that:

In addition to reducing tariffs and non-tariff barriers (NTBs), JSEPA also covers issues such as regulatory reforms, facilitation of customs procedures, cooperation in science and technology, media and broadcasting, electronic commerce, advancing information and communication technology, movement of natural persons and human resource developments.⁶⁸

Also, RTAs now include dispute settlement provisions and bespoke trade remedy measures which are an indication that RTAs are heading in the direction of self-sustaining regimes for the conduct of international trade.⁶⁹ Admittedly, this does not necessarily imply that the WTO is no longer a useful platform for the regulation of international trade relations. Interestingly, even the emergence of dispute settlement structures in RTAs has not escaped the scrutiny of the WTO which still has a significant role to play in ensuring that these dispute settlement mechanisms do not conflict with that of the WTO.⁷⁰ It shows however, how the relationship between the two regimes has shifted from the erstwhile position when RTAs were subservient to the multilateral system to a position of coexistence between both regimes.

More specifically, it is argued that this new era of interdependence between RTAs and the WTO has made the intrusion of the norms of international trade into the

⁶⁷ SM Thangavelu and Mun-Heng Toh, ‘Bilateral ‘WTO-Plus’ Free Trade Agreements: The WTO Trade Policy Review of Singapore 2004’ (2005) *World Econ* 1211, 1217.

⁶⁸ *ibid.*

⁶⁹ See Claude Chase and others, ‘Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?’ (2013) *World Trade Organization Economic Research and Statistics Division Staff Working Paper ERSD-2013-07*; Jennifer Hillman, ‘Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO – What Should the WTO Do?’ (2009) 42(2) *Cornell Int L J* 193, 194-195.

⁷⁰ Chase (n 69) 5. For in-depth discussions on the interaction between RTAs and the WTO on dispute settlement measures see generally, Hillman, (n 69); Songling Yang, ‘The Key Role of the WTO in Settling its Jurisdictional Conflicts with RTAs’ (2012) 11(2) *Chinese J Int L* 281

domestic space of federal setups more pronounced.⁷¹ For example, RTAs are now used not only as instruments for regional integration but also as vehicles for strategic market access.⁷² Like the JSEPA cited earlier, countries seeking regional agreements include disciplines such as intellectual property, government procurement, investment, environment etc. which help to facilitate such strategic market access objectives.⁷³

In the context of this thesis, the impact of the new regionalism and its implication for the evolving relationship between regionalism and multilateralism is that international trade is now transnational in nature.⁷⁴ For example, Sparke avers that there is a localised neo-liberal effect of cross border regional initiatives on governance practices in the countries involved in these regional initiatives.⁷⁵ He argues that:

[The neo-liberal effect of cross border regional initiatives] is not a deliberate and intentional effect of state sovereignty at all, but rather operates to consolidate geographically a more systemic and transnational state effect that is emerging as a result of the deregulative, decentralizing and competition-based governance imperatives unleashed by free trade.⁷⁶

In economic terms, this transnational effect is found in the ability of RTAs to increase competition in the domestic production of the countries involved in an RTA.⁷⁷ Economists envisage that RTAs have the potential effect of combining the markets of the participant countries, thereby making it possible to reduce monopoly

⁷¹ Robert Kaiser, 'Sub-State Governments in International Arenas Paradiplomacy and Multi-Level Governance in Europe And North America' in Lachapelle and Paquin (eds) (n 30) 92

⁷² RV Fiorentino and others (n 65) 8.

⁷³ *ibid* 12.

⁷⁴ Matthew Sparke, 'From Geopolitics to Geoeconomics: Transnational State Effects in the Borderlands' (1998) 3 (2) *Geopolitics* 62.

⁷⁵ *ibid* 65.

⁷⁶ *ibid*.

⁷⁷ Flores G Renato, 'The Gains from MERCOSUL: A General Equilibrium, Imperfect Competition Evaluation' (1997) 19(1) *J Policy Model* 1, 3.

power as firms from different countries are brought into more intense competition, which ought to lead to lower costs, prices and higher quality.⁷⁸

In institutional terms, this leads to closer interactions between actors across geographic borders. It is in these increased interactions between domestic actors in different jurisdictions, that the expansive scope of the new regionalism has brought the process of international trade closer to local levels of governance. This occurs in the form of increased opportunities for local regulation and facilitation of the expanding trade process. It is in these circumstances that SFGs in federal systems are becoming increasingly active in the international economic process. For example, McMilan in his study of the increased activities of US state governors in foreign policy highlights that it is ‘...difficult for governors to ignore how their US state may be affected by international events, whether from economic, environmental, political or public health challenges.’⁷⁹ This is because there is a relocation of these issue areas from the exclusive competence of central governments towards SFGs. This thesis agrees with this view because the extended disciplines which come under the purview of the agenda of the new RTAs directly encroach into the policy space of SFGs.⁸⁰

In essence, what has changed in the dynamics of international economic relations is that the institutional formalism associated with international economic participation is increasingly being surpassed by functional considerations such as ‘access’ arising from the strategic location of SFGs in the international economic process. For example, it is now practicable for SFGs with comparative advantages on a subject matter to demand more input in negotiation in regard to such areas. According to Hocking,⁸¹ this happens when the opportunities created by an externally expanding

⁷⁸ *ibid.* Renato points out that this is not always the case as collusion among a few more powerful firms rather than competition can result depending on variables such as the number of players involved in a third market and the environment.

⁷⁹ Samuel L McMilan, ‘Sub-National Foreign Policy Actors: How and Why Governors Participate in US Foreign Policy’ (2008) 4 *Foreign Pol Analysis* 227, 228.

⁸⁰ See Kukucha (2008) (n 49) 3.

⁸¹ Hocking (n 43) 36.

regionalism coincides with internal regionalism which is driven by comparative advantage.⁸²

In summary, a shift in the hierarchy of norms in the international trade system is evidenced by a change in the character and scope of RTAs originally recognised under art XXIV, rather than a change in legal status. The significance of this change is that the introduction of RTAs which are broader in scope than originally envisaged by the multilateral system has not only increased the prominence of RTAs vis-a-vis the WTO, but has also created an avenue for SFGs to express themselves in international arrangements. This is because the new RTAs encompass subject matters which are transnational in nature and therefore encroach into the domestic space of countries party to these RTAs. This in turn encourages the proliferation of domestic actors in the international economic process.

3.3.2 A Pseudo Constitutional Order Emerging in the International Trade System?

In chapter two, arguments for and against the proposition that a constitutional order has emerged were considered. The position adopted in this thesis is that, though the expanding scope of the multilateral and regional trade systems may not be enough to support the argument that a constitutional order has crystallised, it is substantial enough to demonstrate that the rules relating to international trade interaction have changed.⁸³ This is evident in the divergence between the existing constitutional theory on foreign affairs powers in federal systems and the reality of SFGs now engaging within the evolving framework of the international trade system. Even if this emerging framework is an imperfect process of constitutionalism as Cass claims,⁸⁴ it is definitely normatively distinguishable and potent in its redefinition of international trade practice.

With the new regionalism, there is a new consideration which further exacerbates the constitutionalisation debate. The resurgence of regionalism and the scope of these

⁸² *ibid* 43.

⁸³ See chapter two, section 2.3.2.

⁸⁴ Cass (n 18). See arguments of Cass in chapter two, section 2.3.2.

new agreements do not tilt the scale in favour of either side of the argument. This is because the nature of the new regionalism could provide evidence to support both sides of the debate. For example, an argument in support of the pro-constitutionalisation of the world trade system is that regional integrations such as the EU which fall under the purview of the multilateral trade system have manifested characteristics which are akin to a conventional constitutional order. These characteristics include coherence, unity and a rule of recognition.⁸⁵ However, this could conversely be argued as an error of conflating an institution with a constitution. This is one of the central anti-constitutionalisation arguments of Cass.⁸⁶

In the context of the WTO, Cass describes the institution-constitution conflation as an attempt by pro-constitutionalisation scholars to conceptualise the WTO as an institutional system and not a rules-only system; thereby attempting to vest WTO law with unity and coherence which is in consonance with a new constitutional legal order.⁸⁷ She argues that conflating institutions with constitutions is ambiguous because the use of the language of constitutionalisation to unify and legitimise the WTO contains some uncertainties in relation to content.⁸⁸

In the context of the new regionalism, Cass's arguments could be used to support the argument that even though RTAs such as the EU are taking on formalised and detailed institutional mechanisms like the WTO, they still fall short of a constitutional order. If the WTO, for all the strides it has made to distinguish itself from its member states as an independent regime, is yet to gain universal acceptance as a constitutional order, it is doubtful if regionalism will change that scepticism. The examples of deep integration in the EU are the closest manifestations of a claim to constitutional order in international trade relations. This is because the mandate of the EU is becoming increasingly concerned about other issues aside from

⁸⁵ *ibid.*

⁸⁶ *ibid* 97- 100.

⁸⁷ *ibid* 100.

⁸⁸ *ibid.*

establishing a Common Commercial Policy⁸⁹ which makes it difficult to rely on its jurisprudence as a basis for validating the constitutionalisation claims.

Based on these uncertainties in the arguments for and against the existence of a constitutional order in the international trade system, one significant point which is glaring from the constitutionalisation debate is the reality of the changing landscape of international economic relations. The strides achieved by the WTO in distinguishing itself as an independent controller of international trade relations and the deeper integration models of the new regionalism may not add up to a constitutional order in international trade. They are however substantial enough to support the position that a new dispensation of international economic relations is emerging. In this emerging dispensation, international regimes have challenged the status quo of nation-state centred practice in international economic relations. This has occurred both outwardly towards international cooperation and inwardly towards local participation.

3.4 The Distinguishing Characteristics of the Current Dispensation of International Economic Relations.

In this last section, the key points which have been identified in this chapter will be summarised.

3.4.1 The International Economic System is now a Complicated Labyrinth of Overlapping Regimes.

In this dispensation of international economic relations, there is an increase in the complexity of the international trade system due to overlapping regimes. These complications arising from the interplay of RTAs with the multilateral trade system were referred to as the ‘spaghetti bowl’ effect by Bhagwati. He first referred to the term in 1995 to describe the problem posed by complicated Rules of Origin (RoO) in RTAs.⁹⁰ This term can also be used to describe the complications which arise due to

⁸⁹ See generally, D Leczykiewicz, ‘Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade’ (2005) 6 (11) German LJ 1673.

⁹⁰ See generally Jagdish Bhagwati and Anne O Krueger (eds), *The Dangerous Drift to Preferential Trade Agreements* (AEI Press 1995).

the complex negotiations and trade interactions which dot the international landscape. In terms of the complex RoO to which Bhagwati was originally referring with the term – ‘Spaghetti Bowl effect’, it is clear with the expanding scope of RTAs, that RoO are not the only headache faced in this dispensation of international economic relations. In addition to complicated RoOs, the interplay between regionalism and multilateralism in a globalised era of international relations has generated access for new stakeholders to the international economic process which makes foreign economic policy formulation for any nation an arduous task. It is challenging to interact in a multi-layered system of international economic relations where new actors such as SFGs and non-state actors are now prominent. The interplay between all the relevant stakeholders brings into question the relevance of the existing norm of central exclusivity in foreign relations. This issue is central to the investigation in this thesis because it is paramount that the competing interests which have emerged in the international economic process be balanced enough to achieve success in a multi-layered international economy. This issue will be elaborated on in chapter four where the recommendations of specialist international organisations will be considered with regard to best practices for effective functioning in the current era of international economic relations.

3.4.2 Shift in the Hierarchy of International Trade Regulatory Norms which is intruding into Domestic Policy Arena of Federal Systems.

It has been argued in this chapter that globalisation has facilitated the resurgence of regionalism which as a consequence is affecting the hierarchy of norms in international trade. This shift in hierarchy is not legal because in strictly legal terms RTAs are still subject to the requirements of GATT Article XXIV and the WTO dispute settlement system would be used – and indeed has been used – to challenge RTAs that do not comply with its requirements. However in terms of relevance, the proliferation of RTAs has challenged the priority of the WTO in international economic relations. Furthermore, due to the expansive scope of recent RTAs, opportunities (which do not exist under the WTO system) have opened up for new actors in international economic relations.⁹¹

⁹¹ Hocking (n 78).

3.4.3 Internationalisation of the Economies of SFGs

A significant characteristic of the new dispensation of international economic relations identified in this chapter is that the economies of SFGs are now exposed to the international scene. This has necessitated a response by SFGs to the new situation. According to Kresl, major cities across the world have been forced to respond to the opportunities which globalised economic relations have presented to their urban economies.⁹² In his analysis of the impact of Single European Act (SEA) on the economies of SFGs in the EU, Kresl argues that:

The lowering of barriers to cross-border movement of goods, services, capital and labor (the "four freedoms" of the SEA) has brought many changes in European economic interaction. For cities, it has meant that they must now compete with each other for highly mobile capital, for infrastructure projects funded by a central agency, for major events and for location of production facilities. Regional and Länder authorities have to contend with many conflicting interests, as was noted above, more than ever, though, these authorities must take a proactive position to plan strategically, to promote, to cooperate with other third tier entities, and to create a competitive advantage if the region or Land is to experience rising income, production and employment. Those who take a passive stance are likely to suffer decline.⁹³

This view expressed by Kresl is also evident in other federal jurisdictions. For example, the economies of states in the US such as California, Texas and New York are now so integrated into the mainstream of international trade relations that it is impossible to discountenance their role in the world economy.⁹⁴ This era of international economic relations has been characterised by the rise of mega cities such as New York, London and Lagos as 'demi-sovereigns' in international

⁹² Kresl (n 48) 316-317.

⁹³ *ibid* 317.

⁹⁴ McMilan (n 79) 229 – 230. See also Stéphane Paquin and Guy Lachapelle, 'Why do Sub-States and Regions Practice International Relations?' in Lachapelle and Paquin (eds) (n 71) 79.

relations.⁹⁵ Accordingly, the economies of the nation-states where these mega –cities are located are now becoming so significantly dependent on the international character of these cities.⁹⁶ The internationalisation of the economies of SFGs presents a challenge because it runs contrary to the norm which ignores the participation of SFGs in international economic relations. This divergence between the existing theory and the emerging reality will be considered in chapter five.

3.4.4 Increase in the Opportunities for SFGs to affect the International Economic Process.

A significant characteristic of the current dispensation of international relations is an increase in the opportunities for SFGs to express themselves in international relations. Foreign Direct Investment (FDI) is the most prominent avenue for such expressions. FDI is defined by the OECD dictionary as ‘A cross-border investment by a resident entity in one economy with the objective of obtaining a lasting interest in an enterprise resident in another economy.’⁹⁷ FDI has become an important tool for economic development in the 21st century and is a key element for international economic integration in the current dispensation of international economic relations.⁹⁸

From an institutional perspective, the main actors in FDI interactions include the host governments which are responsible for creating the regulatory framework for facilitating investments in the host country, the foreign private investors which are the direct participants in the economy of the host country and the home country of

⁹⁵ Peter J Spiro, ‘Foreign Relations Federalism’ (1999)70 U Colo L Rev 1223, 1259-70; Julian Ku, ‘Gubernatorial Foreign Policy’ (2006) 115 Yale LJ 2380, 2413.

⁹⁶ See Michael Porter, *The Competitive Advantage of Nations* (Free Press 1990) 158 and 622; Paul R Krugman, *Geography and Trade* (MIT Press 1991) 11 and 14 cited in Kresl (n 93) 318 (Porter and Kurgman argue that ‘the competitive advantage of a nation is to a large extent dependent on ‘locales’ which are conducive to development of competitive firms and industries.’).

⁹⁷ OECD Factbook 2013: Economic, Environmental and Social Statistics <<http://www.oecd-ilibrary.org/sites/factbook-2013-en/04/02/01/index.html?contentType&itemId=/content/chapter/factbook-2013-34-en&containerItemId=/content/serial/18147364&accessItemIds&mimeType=text/html>> accessed 30 August 2013.

⁹⁸ *ibid.*

the foreign private investors which provide the regulatory framework for the protecting the interests of private investors in their country.

The process of FDI emphasises the significance of SFGs in the current dispensation of international relations. First, the host country attracts foreign investors based on potential avenues for investment within the different geographical constituencies in that host country. To attract foreign investors to a host country, the involvement of the SFGs in the location of a potential investment opportunity is needed. Monaghan supports this view arguing that ‘Customised coalitions of sub-national institutions effectively initiate, negotiate and accelerate insidership of inward investment within the foreign market both prior to and during formal entry.’⁹⁹ Conventionally, the central government acts as the mouth piece for SFGs and makes the necessary arrangements to facilitate the entry of a foreign investor into that location of the investment opportunity. Such arrangements include the provision of sovereign guarantees, a legal framework, investment incentives and infrastructure. Compliance is traditionally the area where the input of a SFG is required. The SFG is mandated by conventional constitutional practice to comply with whatever terms the central government puts in place in relation to any FDI. This is one of the reasons why the arguments of Warner and Gerbasi considered earlier, support the view that SFGs are losing governmental authority due to the new governance nexus emerging. This nexus is composed of international agreements, nation-states and private corporations.¹⁰⁰ They argue that the multinational corporations are now enjoying rights accruing from investment treaties at the expense of a diminishing role for SFGs in the FDI process. This view is consonant with the views expressed by Brewer and Young who believe that there has been a shift in foreign investment law from a position in which states have rights and multinationals have duties to a reversal of these roles.¹⁰¹ This is also reflective of a general view in the foreign investment jurisprudence that there has been a policy shift in Foreign Investment Law which

⁹⁹ Sinéad Monaghan, ‘“Courting the Multinational”: Sub-National Institutional Capacity and Foreign Market Insidership’ (2014) 45 (2) J Intl Bus Stud 131, 132 – 134.

¹⁰⁰ Warner and Gerbasi (n 46) 858.

¹⁰¹ Thomas L Brewer and Stephen Young, *The Multilateral Investment System and Multinational Enterprises* (OUP 1998) 273 cited in Fiona Beveridge, ‘Foreign Investment in the WTO’ (2006) 57 (3) N Ir Legal Q 513.

now situates foreign investment as an issue best regulated by international regimes rather than by the nation-state.¹⁰²

Beveridge has considered this shifting focus in the foreign investment law discourse and the reversal of positions between the participants to the foreign investment process.¹⁰³ She utilises the policy science concepts of ‘policy frames’ and ‘policy transfer’ as tools for examining the evidence of a transformation in international law of foreign investment issues from a state-centered classical international law frame, within which foreign investment appeared as a property issue to a market centered neo-liberal frame, under which foreign investment is regarded as a ‘trade’ issue.¹⁰⁴ She argues that although the new frame has shown promise in situating FDI as a trade issue under the multilateral framework of the WTO, success in this regard has been curtailed by the impasse reached at the multilateral negotiations on this issue.¹⁰⁵

The position in Beveridge’s study is useful in this thesis because of its utilisation of ‘policy frames’ as against ‘policy paradigms’ in explaining the changing landscape of international law on foreign investment. Beveridge highlights a distinction between ‘frames’ and ‘paradigms’. According to her, paradigms focus on ‘the ‘core’ or central features of laws, policies and analyses, stripping them bare or reducing them to a minimum yet essential content. Frames on the other hand, refer to the outer limits within which laws or policy must fit if they are not to be disruptive of the existing orders.¹⁰⁶ This conceptualisation of policy frames by Beveridge is an appropriate ‘view of the world’¹⁰⁷ through which the changing patterns of FDI interactions can be appreciated. Policy frames from the FDI perspective present a useful parallel for considering the evidence of the changing character of international economic relations. This is because the participation of SFGs in the FDI process is not substantial enough to fit the description of a policy paradigm as the activities of

¹⁰² Warner and Gerbasi (n 103).

¹⁰³ Beveridge (n 104) 513.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid* 538.

¹⁰⁶ *ibid* 515.

¹⁰⁷ *ibid.*

SFGs in the FDI process do not form a ‘core’ or central feature of the FDI framework. However, it is possible to locate their role in the outer limits within which laws or policy on FDI in federal setups must fit if the existing legal order on FDI is to function without disruption.

Furthermore, it is argued that the policy shift in the international law on foreign investment identified by Beveridge is now extending beyond a market-centered neo-liberal frame towards a new frame in which market driven considerations must now be balanced against the regulatory concerns of new institutional participants such as SFGs.

It is the view in this thesis that the actions of SFGs in relation to FDI point to the growing prominence of this level of government as stakeholders in FDI interactions and therefore the policy frame must be widened to incorporate these new actors.

The decision in the *Metalclad* case may point to a victory of the central governments and private corporations over SFGs, but it is also evident that the capacity of SFGs to affect the process of international relations is a reality. More importantly, it also shows that the dynamics of the new dispensation of international relations makes it possible for SFGs to express themselves in international relations. One way in which SFGs express themselves in the FDI process is by becoming active in trade promotion. This makes them key to the FDI interactions of a nation-state.¹⁰⁸

However, a pattern identifiable under this current dispensation of international economic relations is that SFGs are going a step further than just trade promotion and are becoming ‘gatekeepers’ to the economies of their respective nation-states.¹⁰⁹ This is a pattern which has been observed in Nigeria with the growing prominence of the SFGs as the determinants of FDI inflow to the country. SFGs are now in the forefront of the FDI drive not because they are conforming to the agenda of the federal government but rather in line with their own development objectives.¹¹⁰ This development points towards the emergence of a new protocol in Nigeria’s

¹⁰⁸ Monaghan (n 99) 134. See also Paquin and Lachapelle (n 94) 78.

¹⁰⁹ *ibid*; Hocking (n 88).

¹¹⁰ See chapter one, section 1.4.4.

international economic interaction. This observation will be elaborated on in chapter six.¹¹¹

In addition to the FDI example, another type of opportunity which has arisen for SFGs under the current dispensation of the international economic system is the opportunity to affect the trade liberalization process in federal systems. SFGs are able to affect the trade negotiation process because the expansive scope of international trade norms now encroach on areas which directly affect them. As a consequence, any policy action they take has the potential to positively or negatively impact the overall international economic process. Hayes describes this emerging trend thus:

The emergence of regional and local governments on the world scene, coupled with an aggressive trade agenda encompassing politically sensitive areas to some degree under the control of these local entities, increases the potential for disguised restrictions on trade and other protectionist measures which could thwart trade liberalization. As most of the negative fluctuations created by international trade liberalization (i.e., loss of jobs) are borne at the local level, the likelihood of trade restrictions emanating from the local level increases.¹¹²

This view depicts the extent of the intrusion of international trade norms in the new dispensation of international economic relations. The real impact of international trade norms are now felt at the grassroots, which gives regulators at this level the impetus to participate in the international economic process. These opportunities presented to SFGs to act will not always lead to a positive contribution from these actors. This emphasises why it has become imperative to re-assess the theories underpinning the distribution of powers for foreign economic relations in federal systems.

¹¹¹ See chapter six, section 6.3.4.

¹¹² Hayes (n 34) 10

3.5 Conclusion

Based on the characteristics of the current dispensation of international economic relations discussed above, SFGs have responded to this expansion in the scope of opportunities for international economic participation by demanding more involvement in the process. This is due to the obvious reason that their stake in and the ramifications of the decisions reached at the international level have increased.

Gavin¹¹³ analyses this manifestation of the evolving interaction between old and new emerging actors in the foreign economic policy sphere under the concept of multilevel regulatory governance.¹¹⁴ He defines multilevel regulatory governance as: 'Regulatory strategies and activities covering the development, execution and reform of regulation between national, supranational and sub-national levels.'¹¹⁵ He argues that the expansion in the trade policy sphere has necessitated the involvement of new actors such as SFGs and requires coherence between the multiple layers of trade regulation which have emerged in light of the evolution of the international trade system.¹¹⁶

From the discussions and analyses above, globalisation coupled with the evolution in the external relationship between multilateralism and regionalism has played a crucial role in the expansion of the participation of SFGs in international economic interactions. The resurgence of regionalism in the recent past, especially with the quest for deeper integration has created the impetus for the internal fragmentation of the sovereign status of most participants to these regional arrangements. In instance of the EU, the quest for integration has been resisted in some instances by member states because they have at times struggled to come to terms with the amount of national sovereignty which they have had to give up. More interestingly, the perforation of the sovereign status of members of regional arrangements in the

¹¹³ Brigid Gavin, 'Reconciling Regionalism and Multilateralism: Towards Multilevel Trade Governance' in Philippe De Lombaerde (ed), *Multilateralism, Regionalism and Bilateralism in Trade and Investment: 2006 World Report on Regional Integration* (Springer 2006) 59-72.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.* 60.

¹¹⁶ *ibid.* 69.

integration process has led to a fragmentation of the internal sovereignty bond which hitherto constrained SFGs from expressing themselves on the international front.

In essence, the forays of national governments in federal setups into regional arrangements has come at the price of a loosening grip on the dictates of the constitutional restraints and/or benefits which come from the traditional principles of Westphalian sovereignty.¹¹⁷ As Spiro puts it, ‘The institutionalisation of interstate relations, the disaggregation of the state and economic globalisation all suggest foundational shifts in the structure of the global system.’¹¹⁸

These issues will be considered more comprehensively in chapter five where the theoretical basis underpinning the participation of SFGs in international economic interactions will be discussed and analysed. At this stage in the analysis, the summary of the arguments in this chapter is that the current dispensation of the international trade system has been shaped by geopolitical circumstances facilitating the expansion and incursion of international trade norms into the domestic arena of nation- states. In federal systems, this has encouraged the participation of SFGs in the international economic process. This brings into sharp focus the appropriateness of the existing theoretical framework for international economic interactions in federal systems.

¹¹⁷ Hayes (n 115).

¹¹⁸ Spiro (2002) (n 50) 673.

Chapter Four: The Evolution of Nigeria's Constitutional and Institutional Framework for Foreign Economic Participation (1960 –2013).

4.1 Introduction.

The development of federalism in Nigeria (between 1960 and 2013) has a chequered history characterised by repeated episodes of 'ethno-religious' political upheavals and long periods of military interregna.¹ In the context of this investigation, the aim in this chapter is to examine the political, social and economic problems associated with the evolution of federalism in Nigeria to ascertain how they have impacted on the competences for foreign economic participation in Nigeria between 1960 and 2013. The main focus will be on the constitutional and institutional patterns of Nigeria's international foreign economic policy framework and the relationship between the development of Nigeria's federal system of government and the distribution of powers for international economic relations between the FG and SFGs.

The analysis in this chapter will also include a critique of the extant (constitutional and institutional) framework under the 1999 Constitution. This will be achieved with an evaluation based on working criteria adopted from three international organisations – the Organization for Economic Co-operation and Development (OECD), the United Nations Development Programme (UNDP) and the World Trade Organisation (WTO). This critique will help to identify if there are deficiencies in the current setup. This will set the tone for further investigations in chapter five on how the dynamics of a new dispensation in international economic relations are impacting on the existing federalism theory of central exclusivity in foreign affairs which the Nigerian trade policy mechanism is currently founded upon.

Ideally, the developments in the constitutional and institutional framework for Nigeria's international economic regime can be categorised into five eras: 1960 – 1966 (first civilian Republic), 1967 – 1979 (military rule), 1979 – 1983 (second civilian Republic), 1983 – 1998(military rule), and 1999 – 2013 (fourth civilian Republic). However, due to word count limitations of this thesis and the vast

¹ Ibrahim A Gambari, 'Federalism and the Management of External Relations in Nigeria: Lessons from the Past and Challenges for the Future' (1990) 21(4) Publius 113,123.

literature on the five eras identified above, the main focus of this chapter will only be on two periods of civilian rule (first and fourth civilian republics) in the development of Nigeria's federal system. These two periods have been selected for more detailed analysis because they represent two dissimilar positions in the federalism/international economic relations nexus in Nigeria and hence better illustrate the evolution which has occurred in the constitutional/institutional framework of international economic participation. The 28 years of intermittent military rule is also important to the discourse because the command style of military rule contributed to a centralisation of political structures in Nigeria. As such the discussions on this period will be considered, albeit in a condensed form. Also, the discussions in this chapter will only briefly touch on the second civilian republic because the constitutional and institutional arrangements of this era have been replicated under the current fourth republic.

Excluding the introduction and the conclusion, this chapter is divided into three major sections. Section 4.2 – 4.5 focuses on describing the distinct patterns in the evolution of the constitutional and institutional structure of Nigeria's trade policy regime since independence. Section 4.6 introduces working criteria of the minimum standards of an ideal framework for international economic regimes, as developed by specialised international economic and development organisations. In section 4.7 the working criteria are used as a yardstick for critiquing the effectiveness of the constitutional and institutional framework of Nigeria's international economic policy regime.

4.2 The Constitutional and Institutional Dimension of Nigeria's International Economic Policy Framework (1960 – 1966).

4.2.1 Developments in the Nigerian Federal System (1960 – 1966).

The conception of federalism in Nigeria pre-dates the attainment of independence in 1960.² The seeds of federalism in Nigeria were sown under the colonial rule of Great

² Gambari (n 1) 115. See also WO Wali, 'The Development of Federalism in Nigeria: A Historical Perspective' in Aaron Tsado Gana and Samuel G Egwu (eds), *Federalism in Africa: Framing the National Question*, Vol 1 (Africa Research and Publications 2003) 74 – 75. Wali avers that the foundation of federalism in Nigeria was initiated under the Richard Constitution of 1945 on the recommendations of Sir Bernard Bourdillon (Colonial Governor of Nigeria 1935-1943).

Britain. For example, pre-independence constitutions such as the Richard Constitution of 1945 and the Macpherson's Constitution of 1951 served as a catalyst for the adoption of a federal structure because they introduced the regional system into Nigeria.³ The Lyttleton Constitution of 1954 built on this regional platform by introducing a quasi-federal structure.⁴ The Littleton Constitution provided for a loose federation where each region was granted some form of autonomy.⁵

On the attainment of independence in 1960, the 1960 and 1963 (Republican) Constitutions provided for four constitutions in one single document (one for the FG and one for each of the three regions).⁶ Under this arrangement, the FG superseded the regions only to the extent of inconsistencies between the laws from each level of government.⁷ The federal system in Nigeria between 1960 and 1966 was characterised by strong regional governments each of which had a significant degree of autonomy.⁸ This constitutional arrangement was predicated on the principle that each region got as much as it contributed to the earnings of the country. For example, the principle of derivation was used as the basis for revenue allocation amongst the regions from export duties accruing to the federal consolidated fund.⁹ Also, 50% of mining rents and royalties was payable to the region of origin, while 30% of such mining proceeds went to the federal distributable pool account; from where it was distributed amongst the regions on the principle of size of landmass, population and need.¹⁰ In summary, a symbiotic economic arrangement was in operation amongst

³ Wali (n 3) 77; Obafemi Awolowo, *An Autobiography of Chief Obafemi Awolowo* (OUP 1960) 179 cited in SO Aghalino, 'Dynamics of Constitutional Development in Nigeria 1914-1999' (2006) XL (2) 7 Ind J Pol <www.unilorin.edu.ng> accessed 7 January 2014.

⁴ Wali (n 4 above).

⁵ *ibid.*

⁶ See the Nigeria (Constitution) Order in Council 1960 <www.legislation.gov.uk/ukpga/1960/55/pdfs/ukpga_19600055_en.pdf> accessed 12 May 2010. See also the Constitution of the Federal Republic of Nigeria 1963.

⁷ See s 1 1960 Constitution and s 69 (4) of the 1963 Constitution.

⁸ RA Akindele and Oyeleye Oyediran, 'Federalism and Foreign Policy in Nigeria' (1985) 41 Intl J 600, 604; Eme O Awa, *Federal Government in Nigeria* (University of California Press 1964) 273ff, 280.

⁹ S 123-139 1963 Constitution.

the component units of the Nigerian federation during the period (1960 – 1966). This inspired each region to look inward to concentrate on areas where it had a comparative advantage; with each region being renowned for one form of economic activity or the other.¹¹

4.2.2 Federalism and international economic policy in Nigeria (1960 – 1966)

The Constitutional framework

On the broad subject matter of foreign affairs, the 1960 and 1963 constitutions gave the FG a lead role.¹² Foreign affairs were under the Exclusive Legislative List (ELL) as the prerogative of the FG.¹³ In the specific context of trade and commerce, the FG had overall responsibility.¹⁴ However, the constitutional provisions which gave the FG a lead role also indicated a significant role for the regions in Nigeria's international economic interactions. For example, the principal section which conferred legislative power on the FG for trade and commerce was section 71 of the 1960 Constitution (later renumbered as s 77 of the 1963 Constitution).¹⁵ It provided that:

(1) Parliament may make laws for Nigeria or any part thereof with respect to trade and commerce between Nigeria and other countries and trade and commerce among the territories, including (without prejudice

¹⁰ For an excellent account of the evolution of derivation principle in Nigeria, see generally Chibuike U Uche and Ogonnaya C Uche, 'Oil and the Politics of Revenue Allocation in Nigeria' ASC Working Paper 54/2004 African Studies Centre Leiden, Netherlands <<http://www.rmafc.gov.ng/Arts/workingpaper54.pdf>> accessed 7 January 2014.

¹¹ While the northern region was known for its groundnut production, the southern region was known for its cocoa. Even smaller ethnic groups such as the middle belt groups were renowned producers of agricultural products, the Bini's were known for their artistry and the Niger- Delta was renowned for its palm oil production. See Uche and Uche, (n 11) 18 – 20.

¹² Gambari (n 3) 115. See generally Ufot Bassey Inamete, *Foreign Policy Decision-Making in Nigeria* (Associated Press 2001).

¹³ See item 15 ELL 1960 (Independence) and 1963 (republican) Constitutions. See also Gambari (n 13) 115; Akindele and Oyediran (n 9) 607.

¹⁴ Inamete (n 13) 26.

¹⁵ Item 44 Exclusive Legislative List (ELL) provided for the powers of the FG to legislate on matters such as were designated within their jurisdictions in the constitution. S 77 (Trade and Commerce) is expressly mentioned here amongst other sections.

to the generality of the foregoing power) *the export of commodities from Nigeria, the import of commodities into Nigeria,*¹⁶ *the establishment and enforcement of grades and standards of quality for commodities to be exported from Nigeria*¹⁷ *and the preservation of freedom of trade and commerce among the territories*¹⁸

(2) For the purposes of this section, Parliament may-

(a) *confer on any person or authority exclusive power to acquire from a purchasing authority established for a Region by the legislature of that Region any commodity for export from Nigeria, to export any commodity from Nigeria or to sell any commodity outside Nigeria;*¹⁹ or

(b) *Make provision for the inspection of commodities to be exported from Nigeria **at the port of shipment from Nigeria** and for the enforcement of grades and standards of quality in respect of commodities so inspected.*²⁰

(3) The powers conferred upon Parliament by this section ***shall not include*** powers-

(a) *To establish a purchasing authority for a Region;*

(b) *To confer on any person or authority power to acquire in a Region any commodity for export from Nigeria from any person or authority in that Region **other than a purchasing authority established for that Region by the legislature of a Region;***²¹

¹⁶ Emphasis added.

¹⁷ Emphasis added.

¹⁸ Emphasis added.

¹⁹ Emphasis added.

²⁰ Emphasis added.

²¹ Emphasis added. This shows that the establishment of purchasing authorities was the prerogative of the regions. See also s 77 (5).

(c) *To regulate the prices to be paid by a purchasing authority established by the legislature of a Region for commodities for export;*²²

(d) *To regulate or prohibit in a Region any processing of a commodity to be exported or any dealing with such a commodity other than its export from Nigeria;*²³ or

(e) *To make provision for the enforcement in a Region of any grades or standards of quality for commodities to be exported from Nigeria that may be established by Parliament.*²⁴

(4) *Nothing in this section shall be construed as precluding the legislature of a Region-*

(a) *From making provision for any of the matters referred to in subsection (3) of this section;*²⁵ or

(b) *From conferring upon any purchasing authority of the Region power to acquire any commodity in the Region for purposes other than export from Nigeria*²⁶

(5) *In this section "purchasing authority" means, in relation to a Region, any person or authority empowered to purchase commodities for export in that Region.*²⁷

From the foregoing provision, the following inferences can be made about the allocation of powers regarding international economic participation in Nigeria under the 1960 and 1963 constitutions. First, by virtue of s 77 (1), Parliament (FG) at the

²² Emphasis added. This shows that regulating price of commodities originating from the regions was the prerogative of the regions.

²³ Emphasis added. This shows that processing of commodities for exports was the prerogative of the region, but export procedure at the port was the prerogative of the FG.

²⁴ Emphasis added. This shows that enforcement of standards was made by the regions.

²⁵ Emphasis added.

²⁶ Emphasis added.

²⁷ Emphasis added.

central level was only exclusively responsible for the actual process of export and import and not the processes in-between.²⁸ Although item 10 of the ELL provided that the FG was responsible for custom and excise duties,²⁹ s 77 (3) showed the limitations on the FG to dictate how the regions handled matters relating to the procurement of commodities for export from the producers, the processing of the commodities for export and the setting of price on the goods purchased from the producers. In essence, the regions had responsibilities for the processes before final export of commodities from Nigeria.³⁰ S 77 (2) (a) supports this interpretation because it provides that Parliament could **only** appoint an authority or person to acquire goods from the regional bodies (purchasing authorities) for the purpose of export.³¹ Also, s 77 (2) (b) provided that parliament could only make provision for the inspection of commodities to be exported from Nigeria **at the port of shipment from Nigeria.**³²

Parliament was also responsible for legislating on matters relating to standards and quality of commodities to be exported from Nigeria. However, the regions were responsible for enforcing the legislation on standards and quality made by Parliament.³³ This interpretation is supported by the provision in s 77 (2) (b) discussed above.³⁴ As such, the regions were responsible for enforcement of legislation on standards made by Parliament prior to the commodities reaching the port for shipment. This interpretation is also supported by the combined effect of s 77 (3) and (4) which provided that the FG could not **make provision for the enforcement in a Region of any grades or standards of quality for commodities to be exported from Nigeria** which it (Parliament) had enacted and that a regional

²⁸ See s 77 (2), s 77 (3) (a) – (e) and s77 (4).

²⁹ Item 10 ELL 1960 and 1963 Constitutions.

³⁰ See s 77 (3) (a) – (e) and (4).

³¹ See s 77 (3) (a).

³² See s 77 (2) (b).

³³ See s 77 (3) (e).

³⁴ s 77 (2) (b) (n 32) See also s 77 (3) (e).

parliament was not precluded from making laws in relation to any matter in s 77 (3) (which includes standards in s 77 (3) (e)).

A summary of the first and second inferences made above is that every process other than export was within the prerogative of the regions to legislate on. The regions had power to make laws which empowered their purchasing authorities to carry out processes related to international trade and commerce; except inspection at the port before export and the actual export.³⁵ In essence, the FG did not have powers to control how the regions legislated on matters including: enforcement of standards which they (Parliament enacted),³⁶ processing of commodities for export,³⁷ establishment of purchasing authorities³⁸ and regulation of price to be paid by purchasing authorities for commodities from the producers.³⁹

A third inference deducible from s 77 is that the FG was solely responsible for interstate trade and commerce amongst regions. For example, item 22 of the ELL gave the FG powers to control inter regional water ways and item 20 gave the FG the powers to control insurance entered into by regions which had trans-boundary effects. In effect, the regions could only carry out policy action which operated exclusively within the region.

From the foregoing analysis, it is argued that the regions exercised considerable autonomy and shared responsibility with the FG on matters of international trade and commerce during the 1960 – 1966 period of civilian rule. There were other provisions in the 1960 and 1963 Constitutions which support this argument. For example, the regions had the powers to open representative offices in London.⁴⁰

³⁵ See s 77 (4) (a) and (b).

³⁶ See s 77 (3) (e) (n 35).

³⁷ S 77 (3) (d) (n 23).

³⁸ S 77 (5) and s 77 (2) (b).

³⁹ S 77 (3) (c) (n 22).

⁴⁰ See s 66 (s 64 for the Mid- West Region) of the separate constitutions of the regions which gave the Governors of the regions powers to appoint Agent Generals for the UK offices. See also Gambari (n 14)115ff, 123.

These missions were headed by 'Agents General'.⁴¹ These representatives of the regions 'pursued the economic, educational, and cultural interests of the various regions, such as the administration of scholarships and the attraction of foreign investment.'⁴²

During the first republic, the regions had powers by virtue of s 74 of the 1963 Constitution to influence the ratification of treaties entered into by the FG.⁴³ The section provided inter alia that no treaty or international agreement entered into by the FG could have effect in the regions until the Governor of the region had consented to its operation.⁴⁴ At this point in the development of international law, SFGs were not recognised as stakeholders in the negotiation of international treaties.⁴⁵ Thus, this provision was presumably inserted to safe-guard the contributions of SFGs in the treaty making process of federal systems.⁴⁶ Gambari, commenting on the effect of this particular provision under the 1963 Constitution, argued that during this period the Nigerian state was polarised along ethnic and religious lines and as such, 'It was clearly possible for implementation of a treaty in a region to be held up by the governor's refusal to grant consent due to any of the aforementioned differences [ethnic and religious difference].'⁴⁷ He further argued that this provision held the door ajar for regional participation in foreign affairs because even though the FG:

⁴¹ Gambari (n 41).

⁴² *ibid.*

⁴³ S 74 1963 Constitution.

⁴⁴ *ibid.* See also Gambari (n 43) 115.

⁴⁵ Ramesh C Gosh, *Treaties and Federal Constitutions: Their Mutual Impact* (World Press 1961) 84 cited in Ivan Bernier, *International Legal Aspects of Federalism* (Longman 1973) 14.

⁴⁶ A similar provision is found in older federal systems such as the US by virtue of art II s 2 of the US Constitution. See <<http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm>> 08 July 2013. See also Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009)112. See generally, section 4.4.1 and chapter five, section 5.3.3 for further discussions about the use of safe-guards in the federal systems.

⁴⁷ Gambari (n 45) 115; Awa (n 9) 263. Awa writing earlier in respect of a similar provision as contained in s 53 of the Nigeria Constitution (order in council) 1954, expressed similar fears held by Gambari about the effect of s 74 on ratification of treaties.

[c]ontrolled the key instruments and agencies for formulating and executing foreign policy such as the foreign ministry and overseas diplomatic missions, regional governments were allowed to maintain quasi-diplomatic offices to represent their interests in the United Kingdom.⁴⁸

Accessing capital from the international scene was another area where the regions exercised some level of autonomy during the first republic.⁴⁹ Gambari, Oyediran and Akindele point out that during this period, ‘The regions could negotiate and obtain foreign loans and technical assistance without the knowledge and approval of the national government.’⁵⁰ However, these loans were restricted only to loans for periods not exceeding 12 months on the assets of the regions.⁵¹ Furthermore, although external affairs were under the ELL, the regions capitalised on the freedom given to them under the Concurrent Legislative List (CLL) of the 1960 and 1963 constitutions to propagate foreign policy which had direct and indirect impact on international economic relations. For example, Arms and Ammunition, Bankruptcy and Insolvency, Census, Commercial and Industrial Monopolies, Combines and Trusts, Higher Education, Industrial Development, the Regulation of Professions, Maintaining and Securing of Public Safety and Public Order, Registration of Business Names and Statistics fell under the CLL and were utilised by the regions to propagate policy which directly or indirectly affected foreign relations.⁵²

On some occasions the policies adopted by the regions were at variance with the policy direction of the federal government.⁵³ Akindele and Oyediran illustrate this point with an example of schisms which occurred during the first republic; when the western and eastern regions established economic and cultural ties with Israel to the

⁴⁸ Gambari (n 48).

⁴⁹ See Item 5 ELL 1960 and 1963 Constitutions.

⁵⁰ Gambari (n 49)115; Akindele and Oyediran (n 14) 608.

⁵¹ Akindele and Oyediran (n 51).

⁵² *ibid* 607-608. Other areas where the regions shared legislative responsibility with the FG included Banking (s 78) and Electricity (s 79).

⁵³ *ibid* 618-619.

displeasure of the FG which was anti-Israel, because it was controlled by the northern region.⁵⁴

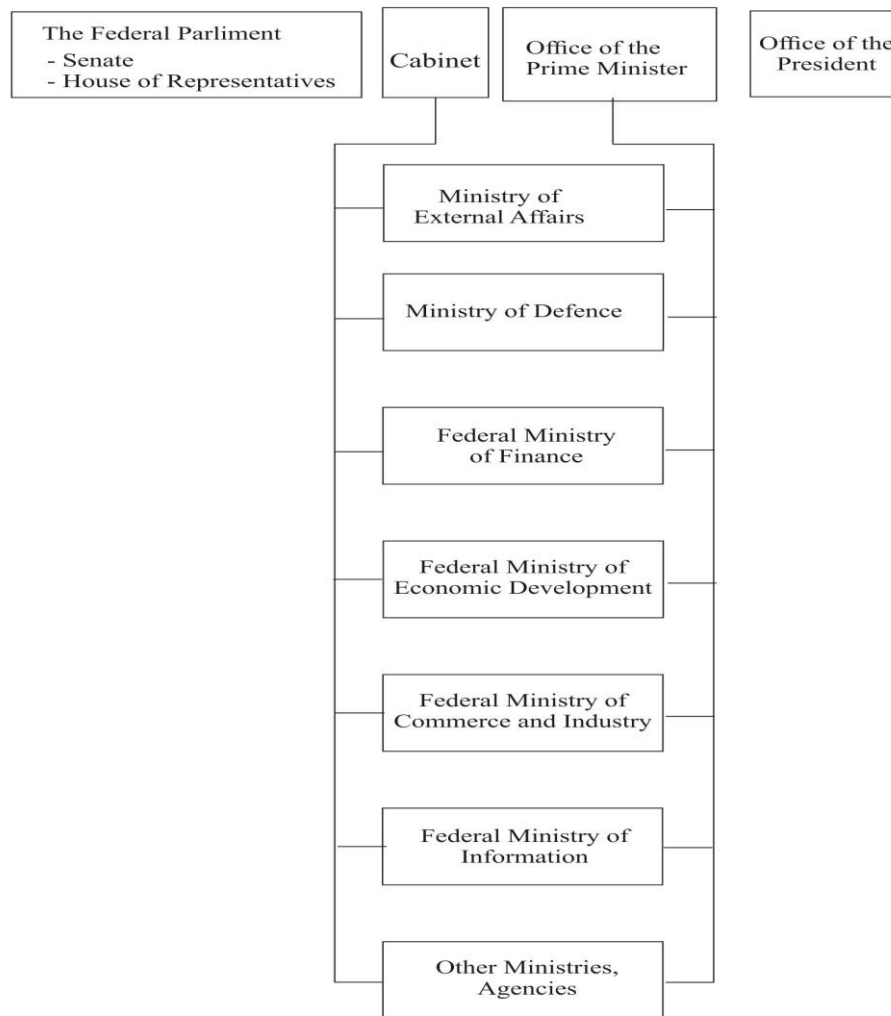
The Institutional framework

During the first Republic, international economic relations was subsumed under the broader framework for foreign policy.⁵⁵ Inamete is of the view that foreign policy (including foreign economic policy) was generally controlled by the FG during the first republic. The general structure of foreign policy (including foreign economic policy) during the first republic according to Inamete is expressed hereunder:

⁵⁴ *ibid.* See generally, TN Ambe-Uva and KM Adegboyega, 'The Impact of Domestic Factors on Foreign Policy: Nigerian/Israeli Relations' (2007) 6 (3 & 4) *Turkish J Intl Rel* 44 for discussions about Nigeria's foreign relations with Israeli since independence.

⁵⁵ See Inamete (n 15) 26-40.

Foreign policy decision-making structure during the First Republic (1960 - 1966).



Source: Foreign Policy Decision-making in Nigeria (London: Associated Press, 2001).

Figure 2 Foreign Policy Decision-Making in Nigeria (1960 – 1966) Source: Inamete 2001.

This diagrammatic representation by Inamete captures the broader context within which foreign economic policy was situated during the first republic. However, it does not take cognisance of the role played by the regional governments in the process during this era. Although Inamete talks about the role of the regions in foreign policy during the first republic, he limits it only to the ability of the regions to open representative offices abroad.⁵⁶ However, the analysis in the previous section of the constitutional provisions under the 1960/63 constitutions demonstrates that the role of the regions in Nigeria's foreign policy was not solely restricted to the opening of representative offices abroad. Hence, Inamete's structure does not adequately

⁵⁶ *ibid* 39-40.

capture the arrangement as it then was. More specific to foreign economic policy and in the context of the contribution of the regions to the process of international trade and commerce during this era, it is argued that Inamete's structure represented above could be modified thus:

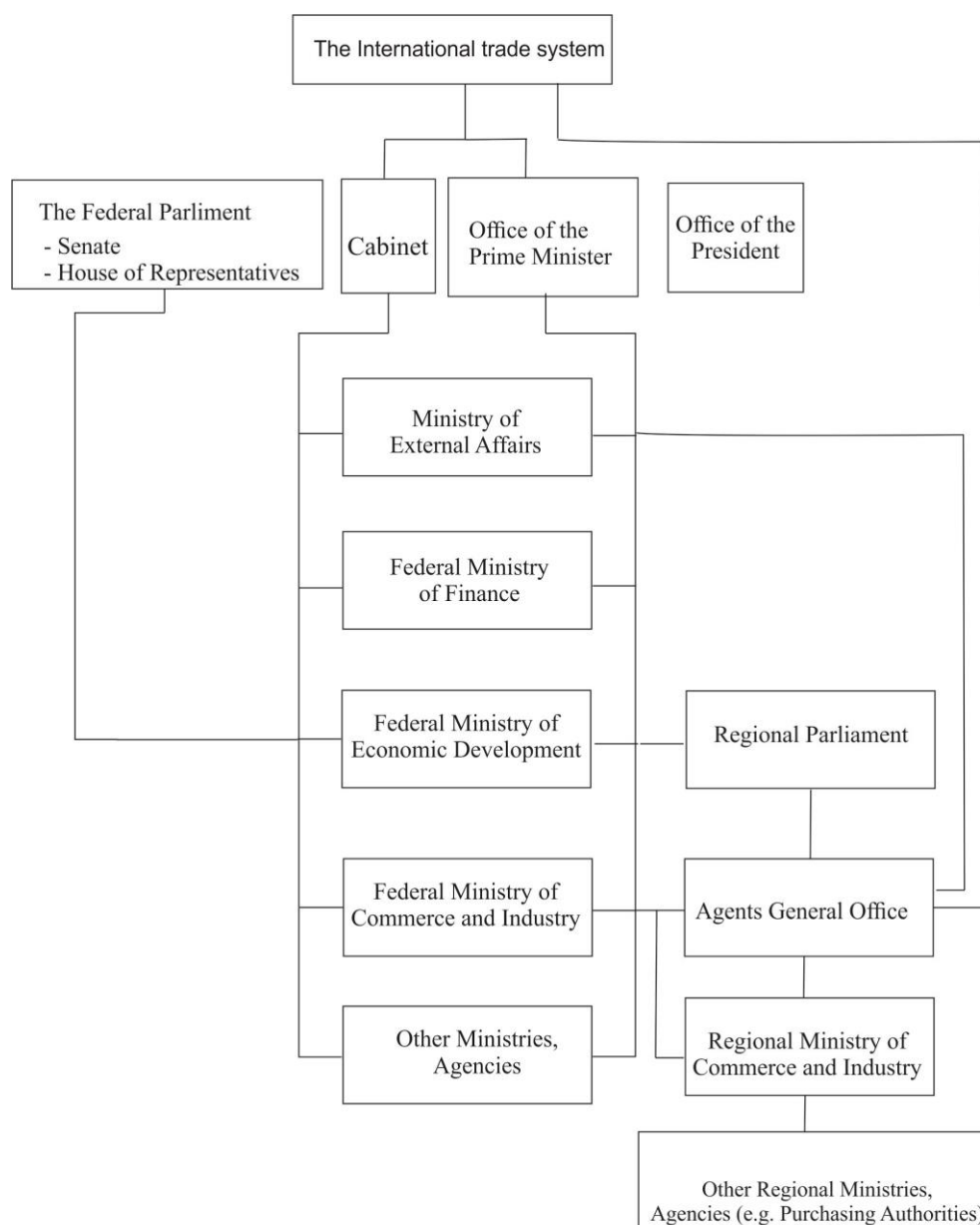


Figure 3: Modified Foreign Policy Decision-making in Nigeria (1960-1966)
Source: Inamete 2001.

It was pointed out in the analysis in the previous section that the competence for conducting external relations and specifically international economic relations was shared between the FG and the regions. As such, the institutions responsible for Nigeria's international economic relations during the first republic can be broadly categorised into two levels – federal and regional.

Federal level

Nigeria operated a parliamentary system of government from 1960 – 1966 and as a consequence; the government at the FG level was structured along the lines of overlapping responsibilities between the Executive and Parliament.⁵⁷ The Executive comprised the President, the Prime Minister and Council of Ministers,⁵⁸ while Parliament consisted of the President, a Senate and a House of Representatives.⁵⁹

The Federal Parliament had powers to make laws for the good governance of Nigeria.⁶⁰ In the area of trade and commerce, it was discussed in the previous section that Parliament had powers relating to subject matters such as export and import, standards etc. However, their powers in this regard were not exclusive as s 77 demonstrates that the regions also shared some of the responsibilities. Inamete points out that the fact that Parliament did not have a committee which had oversight functions over foreign policy during the first republic is evidence of the limited role of the Federal Parliament in this regard.⁶¹

In regard to the role of the Federal Executive in international economic policy, s 84 provided for allocation of portfolios to Ministers. As such the President, acting in accordance with the advice of the Prime Minister, could assign to the Ministers of the Government of the Federation responsibility for any business including the

⁵⁷ For example, the President, Prime Minister and the Ministers (Council of Ministers) were all members of Parliament. See s 87 1963 Constitution; Akindele and Oyediran (n 53) 611.

⁵⁸ S 89 and 90 1963 Constitution.

⁵⁹ S 41 1963 Constitution.

⁶⁰ S 69 1963 Constitution. See also Inamete (n 57) 35-36.

⁶¹ Inamete (n 61) 37.

administration of any department of government.⁶² The portfolios which centred on international economic relations included the foreign ministry which was responsible for external affairs,⁶³ the ministries of commerce and industry, finance, and economic development.⁶⁴ The ministry of commerce and industry had strong formalised links with the ministry of external affairs. For example, officials of the ministry of commerce and industry were seconded to work with external affairs.⁶⁵ Although the ministry of foreign affairs was the lead ministry in relation to foreign policy, these other ministries played a part in Nigeria's international economic relations during the first republic.⁶⁶ For example, the ministries of finance and commerce and industry directly advised the Ministers-in-Council on measures to promote investment in Nigeria (e.g. tariff protection, tax holidays and import duty relief).⁶⁷

Regional level

At the regional level, there was a similar political structure to that of the FG. There was a measure of overlap between the executive (Governor, Premier and the Cabinet Ministers) and the regional Parliament.⁶⁸

In regard to foreign policy, the most conspicuous foreign affairs institution of the regions was the Agents General office. These offices in the UK undertook some

⁶² See s 84 1963 Constitution (n 61). See also Inamete (n 62) 27ff, 38. His analysis of the 1960/63 constitutions demonstrate that during the first republic the Prime-Minister had a strong input on the direction of Nigeria's foreign policy.

⁶³ This portfolio also encompassed the Nigerian Overseas Diplomatic Missions which addressed issues of international economic relations.

⁶⁴ Inamete (n 63) 30.

⁶⁵ *ibid* 31.

⁶⁶ The Ministry of Commerce and Industry was primarily responsible for Nigeria's foreign economic policy. The Ministry of Finance also played a prominent role in international economic relations because of the special position it holds in a parliamentary system as next in rank to the Prime Minister. The Ministry of Economic Development was charged with sorting out international economic assistance for the newly independent country. Inamete (n 66) 27-28ff, 30-31.

⁶⁷ Peter Kilby, *Industrialisation in an Open Economy: Nigeria, 1945-1966* (CUP 1969) 23. See also the Industrial Development (Import Duty Relief) Ordinance 1957.

⁶⁸ Ben Nwabueze, *The Presidential Constitution of Nigeria* (Hurst & Company 1982) 102-108.

aspects of the region's trade objectives such as trade promotion.⁶⁹ In addition to the Agents – General office, the regional government was able to implement international economic related policy in several ways. For example, the regional parliaments were responsible for passing legislation on issues relating to enforcement of standards set by Parliament;⁷⁰ local mobilisation, sensitisation and training on the processing of commodities for export.⁷¹ The regional executive (including the regional ministries of commerce and industry) was responsible for the establishment of purchasing authorities⁷² and the regulation of the price to be paid by these authorities for commodities purchased from the producers at source.⁷³ They also implemented the legislation on standards and quality passed by Parliament.

During this era, there was evidence of cooperation between the FG and regions on international economic issues. For example, the National Economic Council was a forum for FG-regional cooperation on economic and development policies. There was equal representation from both levels of government. The council met once a year but there were sub-committees which met more frequently.⁷⁴

4.3 The Period of Military Interregna.

During the first republic, Nigeria experienced a number of political upheavals which destabilised the civilian government and cumulated in a military takeover in January, 1966. The most notable conflict which eventually led to the first coup d'état in Nigeria was the western regional crisis which started in 1962.⁷⁵ This was the beginning of the military intervention in Nigerian politics which continued intermittently from 1966 to 1979 and then again from 1983 – 1999. During the years

⁶⁹ Awa (n 48) 261.

⁷⁰ See s 77 (3) (e).

⁷¹ S 77 (3) (d).

⁷² S 77 (5) and s 71 (2) (b).

⁷³ S 77 (3) (c).

⁷⁴ Awa (n 70) 246-247.

⁷⁵ The FG and the regions had been enmeshed in political bickering in the western region from 1962 up on till the 1964 general elections. See generally Ladipo Adamolekun, 'Federalism in Nigeria: Toward Federal Democracy' (1991) 21 (4) *Publius* 1, 1-11.

of military rule in Nigeria, three military governments succeeded each other during the first spell from 1966 to 1979 and four military governments ruled Nigeria between 1983 and 1999.

4.3.1 The Constitutional framework

The legal framework during the periods of military rule in Nigeria was formal but unconstitutional. It was formal because the military administration had a structured legal order which operated through the promulgation of decrees at the centre and edicts at the state level. It was however unconstitutional because it was undemocratic and sometimes arbitrary. Some significant decrees which were introduced between 1966 and 1999 include Decree No 1 of 1966 which was used by the Ironsi administration to suspend the 1963 Republican Constitution. Also, the Ironsi administration was responsible for disbanding the Agents – General offices which the regions operated during the first republic.⁷⁶ The Gowon administration maintained this status quo and further entrenched the central command by the military government by promulgating the Federal Military Government (Supremacy and Enforcement of Powers) Decree 28 of 1970.⁷⁷ This Decree was introduced in response to a judicial decision in the celebrated case of *Lakanmi & Kikelomo Ola v Attorney-General (Western State) & Others*⁷⁸ where a military decree was held to be invalid for the first time during the military era. However, Decree No 28 ‘asserted that the first and second military coups were revolutions that altered the legal orders preceding them.’⁷⁹ This action consolidated the supremacy of military decrees over the Nigerian constitution during this era.⁸⁰

The significance of the broad powers wielded by the central command was expressed in the general context of foreign policy. The military administrations which ruled

⁷⁶ Akindele and Oyediran (n 58) 608.

⁷⁷ Diala A Chima, ‘The Dawn of Constitutionalism in Nigeria’ in Morris K Mbondenyi and Tom Ojienda (eds), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* (Pretoria University Law Press 2013) 142.

⁷⁸ SC 58/69 FN 80, reported as (1971) UILR 201.

⁷⁹ Chima (n 78) 142.

⁸⁰ *ibid.*

Nigeria for 28 years cumulatively had unfettered powers to negotiate, sign and implement international agreements on behalf of Nigeria without requiring ratification from the SFGs.⁸¹ This was in sharp contrast to the role which SFGs (regions) had in the first republic. During the military era, the SFGs only enjoyed some level of safeguard under the Gowon administration by virtue of the fact that the state military governors were members of the Supreme Military Council (SMC); this was later reversed under the Muhammad/Obasanjo administration.⁸² In spite of the involvement of SFGs in the SMC under the Gowon administration, it is still doubtful if their input into Nigeria's foreign policy was significant. This is because the nature of military hierarchy made it rare for SFGs to challenge the central command.⁸³ Even if the state administrators had a voice in the SMC, there was no apparatus within SFGs which made it possible for them to have any impact on the international scene as was the case during the first republic. The implication of a centralised hierarchy system on distribution of competences for foreign policy was that SFGs were relegated to the background.

In the context of SFGs and foreign policy, the Obasanjo administration set up the Adedeji committee in 1975 to carry out a comprehensive review of Nigeria's foreign policy.⁸⁴ Gambari points out that 'The Adedeji Committee did not recommend or foresee a formal role for SFGs in foreign affairs. Perhaps this was in keeping with constitutional provisions or the prevailing tendencies of the time, but it was clearly a significant omission.'⁸⁵ It is argued that the omission of SFGs from the foreign policy arena by the Adedeji committee was a reflection of the military's preference for a centralised command system. More importantly, it marked a turning point

⁸¹ During the years of military rule, the supremacy of the SMC over the other organs (including SFGs) in Nigeria's foreign interactions was most profound during the Murtala/Obasanjo regime. See Inamete (n 67) 64-65.

⁸² Olajide Aluko, 'The "New" Nigerian Foreign Policy: Developments since the downfall of General Gowon' (1976) 66 (264) *Commonwealth J Intl Affairs* 405, 412.

⁸³ Gambari (n 51) 114.

⁸⁴ Aluko (n 83) 405; Gambari (n 84) 117.

⁸⁵ Gambari (n 85) 117.

which culminated in the centralisation of the structures for foreign policy in Nigeria which has formally persisted till now.⁸⁶

4.3.2 Institutional Framework.

The institutional framework during the military rule was structured in line with the centralised command system operated by the military. Major foreign policy decisions were determined by the central command (the SMC).⁸⁷ More so, each military administration during each era had the Head of State as a prominent propagator of Nigeria's foreign policy objectives.⁸⁸

Under each military administration, the SMC and the Federal Executive Council (FEC) were the highest levels of government involved in the making of foreign policy in Nigeria. According to Inamete, the FEC handled foreign policy issues which 'required the coordination of policy design, development, implementation and evaluation, by various ministries—e.g. national security, immigration, international border disputes and international trade issues.'⁸⁹ However, 'The FEC was clearly subordinated to the SMC. As the highest decision-making body, the SMC could change, or nullify, any FEC decision.'⁹⁰

In regard to international economic relations, the institutional framework in place during each successive regime was concentrated at the federal level. The federal ministries which played a lead role in Nigeria's international economic interactions

⁸⁶ The recommendations of the Adedeji Committee were the foundation for the constitutional arrangement on foreign policy under the 1979 Constitution and subsequently the current 1999 Constitution. See Inamete (n 82) 39-40.

⁸⁷ The SMC was renamed the Armed Forces Ruling Council (AFRC) by the Babangida administration and was later re-styled as the Provisional Ruling Council (PRC) during Abacha's administration.

⁸⁸ CK Daddieh and TM Shaw, 'The Political Economy of Decision-Making in African Foreign Policy: Recognition of Biafra and the Popular Movement for the Liberation of Angola (MPLA)' (1984) 5 (1) *Int Pol Sci Rev* 21, 26-35.

⁸⁹ Ufot Bassey Inamete, 'Foreign Policy Decision-Making System during the Buhari Administration' (1990) 314 (1) *Round Table* (00358533) 202.

⁹⁰ *ibid* 202.

during military rule included the ministries of finance, economic development, trade, and industry.⁹¹ Each of these ministries reported to the FEC and/or the SMC.

Each administration had military governors at the state levels. The governors also had a cabinet which was manned by commissioners appointed by the military governor. There were trade related ministries at the state level; however they did not exercise similar powers to that of the civilian administration of the first republic. The military administrations at the state level were confined to handling domestic matters within their jurisdictions. As such, the involvement of SFGs in foreign policy were little or non-existent at this point in Nigeria's history.⁹²

There are arguments in support of a proposition that the periods of military rule in Nigeria did not abrogate the existence of a federal system in Nigeria. Those in support of this position include Gambari, Akindele and Oyediran who argue that military rule did not totally abrogate the practice of federalism in Nigeria, but only hampered its proper functioning.⁹³ The views in this thesis do not align with this interpretation of the historical account because the retention by the military government of SFGs headed by junior ranking military officials does not suffice to make the system of government in place during this period federal.⁹⁴ For example, during each era of military rule the Constitution was suspended and successive military governments adopted a unified and hierarchical command system. This brings into question the validity of claims asserting a continued existence of a federal system in Nigeria under military rule.

⁹¹ Inamete (2001) (n 87).

⁹² Gambari is of the view that military administrations in Nigeria have had a better record of checking state forays into foreign affairs than have civilian governments Gambari (n 86) 122-124.

⁹³ Akindele and Oyediran (n 77) 603. See also Oyovbaire, who argues that military rule was compatible with federalism in Nigeria Sam E Oyovbaire (ed), *Federalism in Nigeria: A Study of the Development of the Nigerian State* (Macmillan 1983) 273 cited in Dele Olowu, 'The Literature on Nigerian Federalism: A Critical Appraisal' (1991) 21 (4) *Publius* 151, 159. Those in support of the counter position that federalism ceased to exist in Nigeria during the military era include AO Phillips, 'Fiscal Goals and the Revenue Allocation System' in Dele Olowu (ed), *The Nigerian Federal System: Administrative Problems under Civilian and Military Governments* (FACS Publications 1991). Phillips is of the view that federalism died in Nigeria with the emergence of military rule in 1966. See also G Williams (ed), *State and Society in Nigeria* (Afrografika 1980) 100. Williams argued that military rule turned Nigeria into a unitary country in federal disguise.

⁹⁴ During the Gowon era, the regions were renamed states and Nigeria now comprised of 12 states. It later became 19 during this period under consideration.

In the context of foreign policy (including international economic interactions), the centralised command system of military rule determined the distribution of powers in this regard. The structure of foreign policy during each military administration was similar in that little room was allowed for SFGs to express themselves on the international scene.⁹⁵

4.4 The Constitutional and Institutional Dimension of Nigeria's International Economic Relations Framework (1979 – 1983).

In 1979, the Obasanjo administration paved the way for a return to civilian rule in Nigeria. Nigeria departed from the parliamentary system of government operated during the first republic and adopted a presidential system of government built on the US model.⁹⁶ The military handed over to a civilian elected president – Shehu Shagari. A new constitution was adopted for Nigeria in 1979 which restored the federal system of government.⁹⁷ The Shagari administration was in office till December, 1983 when the military took over power in a military coup d'état.

As a result of the striking similarities between the constitutional and institutional provisions during this era and the subsequent fourth republic, the discussions in this section will be brief. The significant point to note from this era is that the constitutional framework for foreign policy in Nigeria under the 1979 constitution gave the FG wide ranging powers to control Nigeria's foreign policy. Akindele and Oyediran point out that:

There is abundant evidence in the record of the Constitution Drafting Committee and in the provisions of the 1979 constitution itself of the determination of the authors of the constitution to make the federal government the sole Nigerian actor and spokesman in international affairs.⁹⁸

⁹⁵ Akindele and Oyediran (n 97) 608; Gambari (n 96)115.

⁹⁶ See generally Nwabueze (n 69).

⁹⁷ Akindele and Oyediran (n 104) 605.

⁹⁸ Akindele and Oyediran (n 106) 608-609.

The constitution achieved this objective by ensuring that the external affairs competence of the FG encompassed all the areas where SFGs had been active in the foreign scene during the first republic. The legislative competence of the FG was extended to cover all aspects of:

...trade representation; external affairs; implementation of treaties relating to matters on the exclusive legislative list, trade and commerce between Nigeria and other countries, and borrowing of moneys within or outside Nigeria for the purposes of the federation or of any state.⁹⁹

Other areas which were formerly within the competence of SFGs which were now exclusively reserved for the FG included: the powers to setup purchasing authorities, inspection of commodities, standards and control of prices for commodities.¹⁰⁰ The only aspect of sub-national participation in foreign policy which was carried over from the 1963 constitution was the safe-guard requirement which was retained under s 12 of the 1979 constitution.¹⁰¹

4.5 The Constitutional and Institutional Dimension of Nigeria's International Economic Policy Framework (1999 – 2013).

4.5.1 Developments in the Nigerian Federal System (1999 – 2013).

Nigeria returned to civilian rule on May 29, 1999. General Obasanjo (now retired) became the first civilian elected President of the fourth republic. In this dispensation of civilian rule, Nigeria was under the leadership of President Obasanjo from 1999 to 2007. President Umaru Yar' Dua took over in 2007 and was in office till 2010 when he died due to terminal illness. His Vice President – Goodluck Jonathan took over office and completed the late Yar' Dua's first term in 2011. He was re-elected in 2011 and will complete his own first term in 2015.

⁹⁹ *ibid* 608.

¹⁰⁰ See Item 61 ELL 1979 Constitution. See also Nwabueze (n 105) 63-64.

¹⁰¹ Although this provision provided a basis for SFGs to challenge policies of the FG on matters foreign economic relations taken by the FG, it was limited to just international treaties and there is no record that this provision was ever used. See Akindele and Oyediran (n 108) 608.

A new constitution which was drafted during Abacha's military rule was enacted as the Nigerian 1999 Constitution.¹⁰² The constitution restored a federal system of government to Nigeria and retained the presidential style of the second republic. Nigeria comprised three recognised levels of government (the FG, 36 states and local governments).

In 2003, the Obasanjo administration introduced a midterm economic development strategy themed National Empowerment and Economic Development Strategy (NEEDS) to run from 2003 to 2007. NEEDS was targeted towards poverty alleviation, employment generation, reorienting values and wealth creation.¹⁰³ This development agenda was also premised on a 'vision of a Nigeria with a new set of values and principles, which will facilitate the achievements of national goals of wealth creation, employment generation and poverty reduction.'¹⁰⁴

With respect to Nigeria's trade policy, NEEDS sought to achieve predictability in Nigeria's trade policy regime and also to improve Nigeria's regional integration so as to serve as a stepping stone to global integration.¹⁰⁵ A state level framework - SEEDS (State Economic Empowerment and Development Strategies) was also introduced by the 36 states in Nigeria. NEEDS and SEEDS were meant to be complementary in Nigeria's development agenda.¹⁰⁶ The relevance of this development agenda in the context of this investigation is because its central focus was on institutional reforms which included: Public sector reforms, Privatization and liberalization, Governance, Transparency and anticorruption as well as service delivery by government agencies.¹⁰⁷

¹⁰² Nigerian 1999 Constitution (n 2).

¹⁰³ See Paul Adogamhe, 'The Nigeria's National Economic Empowerment and Development Strategy (NEEDS): A Critical Assessment' (Annual meeting of the International Studies Association 48th Annual Convention, Chicago, February 2007). See also 'Rural poverty approaches, policies and strategies in Nigeria' <<http://www.ruralpovertyportal.org/en/country/approaches/tags/nigeria>> accessed 4 April 2014.

¹⁰⁴ Office of the Head of the Civil Service <<http://www.ohcsf.gov.ng/index.php/news-media/arts/policy-reforms/needs>> accessed 03 June 2014.

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

At the inception of NEEDS and SEEDS in 2003, the FG claimed that: NEEDS was designed to fashion for Nigeria a common ground for all economic agents to interplay, in a healthy and sustainable manner. The NEEDS and SEEDS were intended to be complementary so as to coordinate a planning framework with agreed common priorities between the FG and SFGs. A significant aspect of the development agenda was the adoption of a standard strategic planning cycle used in many governments and business organisations around the world.¹⁰⁸ The five steps of the cycle were: 1) Setting Targets, 2) Developing Strategies, 3) Planning and Allocating Resources, 4) Implementation and 5) Monitoring and Evaluation.¹⁰⁹

On face value, the ideals and vision of the NEEDS/SEEDS agenda point towards a robust framework for achieving an appropriate level of cooperation between the FG and states on issues of economic importance. However, it is not clear to see if this elaborate agenda achieved its anticipated targets. More so, this thesis is particularly concerned about the constitutional dimension which is needed to achieve true federal ideals in Nigeria's general development agenda and her international economic interactions in particular. Hence, this agenda will be critiqued in section 4.7 where the system in Nigeria will be evaluated in line with working criteria adopted from the similar development strategies adopted in the NEEDS/SEEDS.

Yar'Adua took over from Obasanjo in 2007 and immediately introduced a Seven Point Agenda to compliment the NEEDS strategy of the previous administration. This complimentary development agenda streamlined the priorities of the Yar'Adua government to issues such as power generation, health, education, communication, transport, agriculture and security.¹¹⁰

In this current dispensation of civilian rule, Nigeria has undergone two Trade Policy Reviews with the WTO in 2005 and 2011.¹¹¹ In the regard to the institutional framework for Nigeria's trade policy regime, both reports identified that

¹⁰⁸ National Planning Commission, 'SEED Manual: A Framework for Development Planning, from Strategy to Action' (2005) <<http://www.jfmorton.co.uk/pdfs/Manual.pdf>> accessed 15 May 2014.

¹⁰⁹ *ibid.*

¹¹⁰ See generally Rural Poverty Approaches, Policies and Strategies in Nigeria (n 112).

¹¹¹ Nigerian Trade Policy Report WT/TPR/S/147 13 April 2005 (05-1463); WTO TPRM Report for Nigeria 2011 WT/TPR/S/247 28 and 30 June 2011.

predictability in Nigeria's trade regime was yet to be actualised.¹¹² During this period, Nigeria's trade policy was hinged on the desire to improve the efficiency of her trade and trade related institutions. Reforms have been carried out in the banking sector and the Foreign Direct Investment (FDI) sector.¹¹³

Under the fourth republic, the 1999 Constitution and the Nigerian Trade Policy Document (NTPD) 2002 are the key documents which provide the constitutional and institutional framework for international economic policy in Nigeria.¹¹⁴

4.5.2 Constitutional framework.

The 1999 Constitution maintained the central dominance of the FG in foreign policy which was inherited from the 1979 Constitution and the years of military rule.

The provisions of the 1999 Constitution which entrench central exclusivity in Nigeria's international economic regime include: Item 62 of the ELL which provides for 'Trade and commerce, and in particular - (a) trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria, and trade and commerce between the states;...' Other Items in the ELL which give the FG plenary powers on matters of international economic relations include: Item 20 which empowers the FG to send and receive diplomatic, consular and trade representation; Item 26 which provides that external affairs is within the competency of the FG; and Item 31 which provides for the FG's powers to implement treaties relating to matters on the ELL.¹¹⁵ Some other ancillary Items which consolidate the powers of the FG in relation to international economic relations include Item 39 which puts the FG in charge of mines and minerals, including oil fields, oil mining, geological surveys and natural gas. Also, s 16 of the 1999 Constitution (Fundamental Objectives of State Policy) identifies the national

¹¹² *ibid.*

¹¹³ The Investments and Securities Act 2007 CAP 124 LFN 2004; Nigerian Investment Promotion Commission Act Cap N117 (Decree No 16 of 1995) LFN 2004.

¹¹⁴ See generally the Nigerian Trade Policy Document (NTPD) 2002.

¹¹⁵ Cf: s 12 of the 1999 Constitution – provides a platform for SFGs to participate in the ratification of international treaties between Nigeria and other countries.

economy including external economic relations as an objective of the Nigerian State to be discharged by the FG.

4.5.3 Institutional Framework.

The Nigerian Trade Policy Document (NTPD) sets out the institutional framework for international trade and commerce in Nigeria during the fourth republic. In the context of international economic interactions, one of Nigeria's trade policy objectives under the NTPD is to ensure: 'effective participation in trade negotiations to enhance the achievement of national economic gains in the multilateral trading system, as well as regional and bilateral arrangements...' ¹¹⁶

The NTPD consolidates the position of the FG as the primary institution responsible for international economic policy in Nigeria. For example, under the institutional framework contained in the NTPD, the FEC headed by the President is the highest decision making organ on matters of foreign economic policy. In the context of international trade, commerce and investment, the NTPD gives the Federal Ministry of Commerce and Industry (now renamed Federal Ministry of Trade and Investment (FMTI)) the overall responsibility for coordinating trade policy formulation in Nigeria. ¹¹⁷ The Ministry is responsible for coordinating the activities of three other principal organs responsible for decision making on trade related issues. These organs are the FEC, the National Council of State (NCS) and the National Assembly (NA). ¹¹⁸ However, trade policy ratification ultimately rests with the FEC. Other organisations that offer policy inputs include Federal Ministry of Finance (FMF), Federal Ministry of Industries (FMI), the Nigeria Customs Service and the Central Bank of Nigeria. ¹¹⁹

¹¹⁶ NTPD 2002 (n 123) 4.

¹¹⁷ *ibid.*

¹¹⁸ The NA is responsible for passing into law trade policies that require legislative backing.

¹¹⁹ Jerome Afeikhena, 'Strengthening Research and Analytical Support for Trade Policy-Making in African Countries: The case for Nigeria' in Elias T Ayuk and Mohamed Ali Marouani (eds), *The Policy Paradox in Africa: Strengthening Links between Economic Research and Policymaking* (Africa World Press 2007).

Within the federal level of government, policy may be initiated at the ministry level mainly by the FMTI or FMI. In addition to these principal organs there exist some other committees and boards which have an advisory role in relation to trade related issues. For example there is the Tariff Review Committee/Board, which reviews all request and issues relating to tariffs. There is also the National Focal Point on Multilateral Trading Matters; the Export Strategy Committee; and the Committee on Export, Import, Free Trade Zone, Freeport and Procurement Policies which meets on ad-hoc basis.

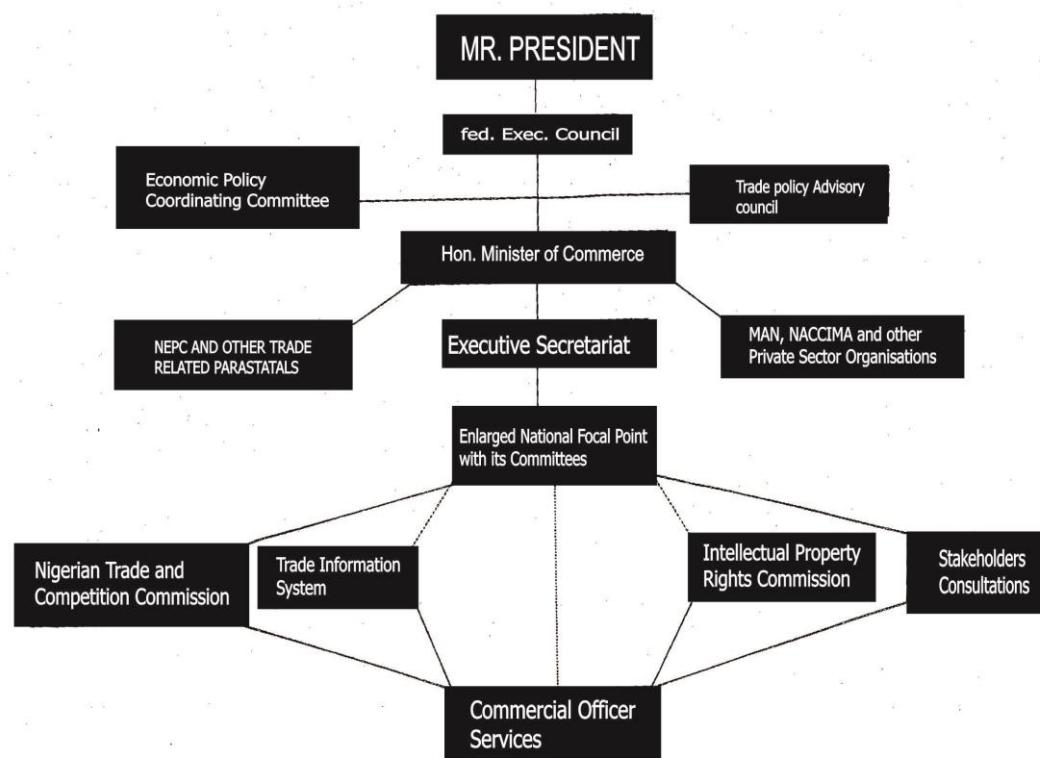
The National Council on Commerce (NCC) – which is the highest body/council where trade policy issues are taken – is the forum of expression for SFGs and non-state actors such as the Manufacturers Association of Nigeria (MAN), Nigerian Association of Small Scale Industry (NASSI) and Nigerian Association of Chambers, Industry, Mines and Agriculture (NACCIMA) etc. Their contributions within this forum are in the forms of dialogue and policy decisions which are institutionalised through feedback mechanisms. These include reports back to the council on a yearly basis as reports of implemented trade decisions.¹²⁰

From interviews and the NTPD, the objectives of the NCC can be summarised as follows:

- The NCC is a soft law mechanism for incorporating the views of all stakeholders (including SFGs) on issues of trade and commerce;
- The NCC is a knowledge sharing forum which is meant to serve as an avenue for the central government to obtain views and opinions from stakeholders on what Nigeria's international economic policy direction should be;
- The NCC is an avenue for the central government to keep stakeholders abreast of the policy direction which the FG is constitutionally empowered to handle, make laws and/or sign agreements on; and
- The process is more reflective, informative and reactionary rather than proactive.

¹²⁰ NTPD 2002 (n 126).

It was identified during the field trip to Nigeria that the NCC is the most significant forum for SFGs to participate in Nigeria’s international economic interactions. However, the extent to which it is an effective reflection of the level of SFGs participation is in doubt. For example in **Figure 4** below, the NCC is conspicuously omitted from the diagrammatic structure of Nigeria’s trade policy regime under the NTPD. This is an indication of its negligible ranking in the existing system.



Institutional Framework for Trade Policy in Nigeria.

Figure 4: International Trade Policy Structure in Nigeria 2002. Source: Nigerian Trade Policy Document 2002.

It has been identified that the original position after independence regarding international economic interaction was that of a shared competence between the FG and SFGs. The analysis above also demonstrates that the disruptions to the operation of federalism in Nigeria from 1966 upwards played a significant role in the deviation from the position obtainable during the first republic.

Up to this point, the analysis in this chapter has predominantly been explanatory, outlining the historical evolution in the framework for Nigeria's international economic relations from 1960 - 2013. More importantly, it has been outlined in this section how and why the system for international economic relations in Nigeria aligns with a central exclusivity model. It was identified in the analysis that there was a significant alteration of competence for international economic relations between 1960 and present.

In the next section of this chapter, the effectiveness or otherwise of the current centralised position will be discussed so as to establish the suitability of the extant constitutional and institutional framework for international economic participation in Nigeria.

4.6 Assessment of the Effectiveness of the Extant Institutional Framework in Nigeria.

To objectively assess the current framework for international economic participation in Nigeria, this chapter will adopt working criteria which encapsulate the minimum standard of what a country's international trade framework should adhere to. The working criteria will be based on recommendations developed by international organisations such as the WTO, UNDP and OECD from their comprehensive studies on trade policy in developed and developing countries.

There are other variables which have contributed to the overall functioning of international economic relations in Nigeria. For example, it was identified in the first part of this chapter one that there have been systemic issues such as lack of political continuity, over dependence on one resource base, corruption and political instability to mention a few. These issues have played a significant role in shaping the current system for international economic relations in Nigeria. However, the focus in this thesis is on the constitutional and institutional issues affecting the competence for international economic relations in Nigeria.

4.6.1 Elements of an Effective Policy Framework for Economic Relations.

It is not possible to recommend a single policy framework or exhaustive criteria which are ideally suited for promoting effective economic relations for all countries and in all circumstances.¹²¹ The reasons being that:

- Countries have different objectives which they seek to achieve from their participation in international economic interactions;
- Countries within the international system are at different developmental stages; and
- Countries do not have the same endogenous constitutional configuration which facilitates and shapes their international economic interaction.

However, international organisations such as the WTO, UNDP and OECD have undertaken studies and reviews on the patterns of economic policy in developing and developed countries alike, pointing to several features or arrangements which are regarded as a minimum requirement of an ideal policy framework. As such, these are recommended as a yardstick for measuring the effectiveness of a country's regime.

OECD

In the context of developing countries, the OECD in 2001 recommended a set of Guidelines on Capacity Development for Trade in the New Global Context. The OECD advocated that foreign aid donors and the recipient developing countries should seek to construct trade policy frameworks based on the following elements:

1. A **coherent** trade strategy that is closely **integrated** with a country's overall development strategy.
2. Effective mechanisms for **consultation** among three key sets of stakeholders: **government, the enterprise sector and civil society.**
3. Effective mechanisms for **intra-governmental policy co-ordination.**

¹²¹ OECD, *DAC Guidelines on Capacity Development for Trade in the New Global Context* (OECD Publishing 2001).

4. A strategy for the enhanced collection, dissemination and analysis of trade-related information.
5. Trade policy networks supported by indigenous research institutions.
6. Networks of trade support institutions.
7. Private sector linkages.
8. **A commitment by all key trade stakeholders** to outward-oriented regional and global strategies.¹²²

The OECD also advocates that every trading nation should adopt a four-stage trade policy cycle -**formulation, negotiation, implementation, monitoring and evaluation**- to effectively interact in the international trade system.¹²³

The OECD in its 2006 report on the ideal elements of National Sustainable Development Strategies (NSDS) in OECD countries has also advocated that sub-national governance structures have a role to play in developing a coherent NSDS policy.¹²⁴ The OECD is of the view that ‘local and regional authorities should be fully involved in the development of national strategies with certain delivery aspects devolved to sub-national level.’¹²⁵ The OECD further emphasises in this report that there is need for linkage between national and local structures in the development of NSDS.¹²⁶ Although this recommendation originated within the sustainable development paradigm, it presents a useful parallel which is relevant to international trade. More so, environment and international commerce have become increasingly linked in a globalised era of international relations. Both subject matters are affected

¹²² *ibid* 14ff, 43.

¹²³ *ibid* 42. See J Omiti and others, *Trade Policy-Making Process in Kenya: The Institutional Arrangements and Interaction of Actors* (2007) Institute for Public Policy Research and Analysis <<http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/1808.pdf>> accessed 15 May 2014.

¹²⁴ OECD, *Good Practices in the National Sustainable Development Strategies of OECD Countries* (OECD Publishing 2006) [hereinafter OECD 2006].

¹²⁵ *ibid*.

¹²⁶ The United Nations (UNDP) proffers a similar recommendation and specifies that linkage between levels of governance should also have a global linkage.

by the trans-boundary considerations and interconnected issues which make it imperative that policies on these subject areas are developed in tandem. As such, a national strategy on sustainable development feeds into a national strategy on international economic relations and the OECD recommends SFGs as crucial stakeholders in this process.

Furthermore, it was identified in the previous section of the chapter that some of the key development agendas (NEEDS and SEEDS) introduced in Nigeria during the fourth republic were fashioned according to a similar cycle based strategy advocated by the OECD.¹²⁷ Therefore it is useful to consider the theoretical model relied on so as to compare the theory with its actual application in Nigeria. The key themes within these recommendations above which are useful to the analysis in this chapter include the reference to: **coherence, integration, consultation** and **co-ordination**.

The UN (UNDP).

The UN under the auspices of the UNDP has reiterated the need for similar qualities in an ideal trade policy framework. In its recommendations for trade policy capacity building in developing countries, the UNDP has advocated the engagement of all relevant stakeholders as a key factor for success. In a 2011 UNDP report on *Trade and Human Development: A Practical Guide to Mainstreaming Trade*,¹²⁸ it is recommended that government entities at national and sub-national levels should be involved at some stage in the creation of trade and development policy.¹²⁹ It also states that: ‘Trade must be actively mainstreamed into every stage of the policy cycle, beginning with sound analysis, **consultation and communication**.’¹³⁰ What is instructive in this recommendation is the recognition of the participation of SFGs in the trade and development nexus and the emphasis on linkage between stakeholders. The analysis in section 4.7 will consider whether Nigeria’s international foreign

¹²⁷ See section 4.5.1 ‘text to n 118’.

¹²⁸ UNDP, *United Nations Report on Trade and Human Development: A Practical Guide to Mainstreaming Trade* (UN Publications 2011) [http://www.undp.org/content/dam/uganda/img/Research%20and%20Publications/Trade%20and%20Human%20Development%20\(Mainstreaming%20trade\).pdf](http://www.undp.org/content/dam/uganda/img/Research%20and%20Publications/Trade%20and%20Human%20Development%20(Mainstreaming%20trade).pdf) accessed 16 December 2013.

¹²⁹ *ibid* 2ff, 17.

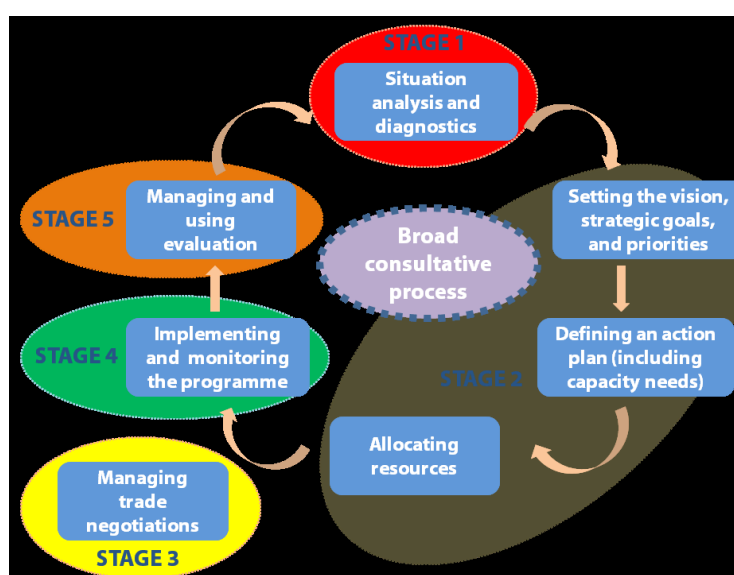
¹³⁰ *ibid* (emphasis added) 3ff, 17-19.

economic policy framework under the current dispensation has embraced these elements.

The UNDP report also identifies some of the challenges militating against mainstreaming trade with development to include inter alia:

- Shortcomings in *stakeholder consultation* and *interdepartmental coordination*
- A political culture of *limited participation* which results in weak parliamentary processes.
- The narrow involvement of the private sector, civil society and *other stakeholders* in trade policy formulation.
- *Poor accountability* in trade negotiations and implementation of trade-related reforms.

The UNDP also presents a typology of a trade policy cycle which is similar to the OECD's model. The UNDP model has five stages. Stage one covers situation analysis and diagnostics; stage two outlines vision, strategic goals and priorities, defines the action plan and allocates resources; stage three manages trade negotiation; stage four focuses on implementing and monitoring the programme and stage five focuses on managing and using the evaluation.¹³¹ See **Figure 5** below:



¹³¹ ibid 19-23.

The importance of this trade cycle typology to this thesis is the consideration it gives to the link between development and trade policy.¹³² More importantly, it also identifies the place of SFGs as stakeholders in the process of broad consultations required for an effective trade policy cycle.¹³³

WTO

The periodic review of the member states trade regimes by the Trade Policy Review Mechanism (TPRM) has become an important yardstick for measuring the adherence of member states to sound domestic economic policies and its impact on their ability to adhere to their commitments under WTO agreements. The TPRM is relevant to the analysis in this chapter because a fundamental element which informs the work of the TPRM is domestic transparency. In the specific context of institutional capacity of a trade regime, the TPRM is particular about **stability** and **predictability** in the constitutional and political framework of WTO member countries. The WTO encourages its members to adopt policies which meet these stipulations because they are believed to be beneficial not only to the member states under review, but also the trading partners of such member states and to the overall functioning of the multilateral trade system.¹³⁴ This emphasis on **stability** and **predictability** will be considered in the subsequent analysis of Nigeria's extant framework on international trade, commerce and investment.

From the foregoing, key elements which will be adopted as working criteria for assessing Nigeria's international foreign economic regime include:

¹³² See chapter six, section 6.3.1 for discussions on the relevance of linking trade to development so as to achieve coherence in the international economic interactions of SFGs and central governments in federal systems.

¹³³ UNDP (n 140) 21-22ff 57-59.

¹³⁴ Joseph F Francois, 'Trade Policy Transparency and Investor Confidence: Some Implications for an Effective Trade Policy Review Mechanism' (2001) 9(2) Rev Int Econ 303, 304 – 305.; See also S Laird, 'The WTO's Trade Policy Review Mechanism—from through the Looking Glass' [1999] The World Econ 741, 755

Flexibility

Flexibility is a reoccurring factor which can be deduced from the recommendations of the three organisations considered above. Flexibility in a literal sense can be defined as ‘The quality of bending easily without breaking, e.g. willingness to change or compromise.’¹³⁵ Flexibility in a framework is characterised by accommodation of all relevant stakeholders through consultation, dialogue and compromise where necessary. In the context of international economic policy, flexibility has become imperative because of the crosscutting nature of international economic issues. For example, it is now clear that international trade intersects with issues such as the environment, human rights and human development. As a consequence, new actors are emerging in the international trade processes which were not traditionally recognised in international law. For example, the UNDP and OECD recommendations which advocate wide participation with relevant stakeholders in efforts to successfully mainstream trade with development objectives emphasise how difficult it is to achieve coherence and predictability in the absence of flexibility.

Coherence/ Predictability

Flowing from the above, it is argued that Coherence is another important element which is required in an ideal trade policy framework. Coherence entails consistency in the overall policy direction of a trade regime. For example, the recommendations of the OECD, UNDP and the WTO emphasise the need for coherence between trade and national development strategies. More importantly they identify the need for wider participation and accommodation of all stakeholders to achieve coherence. It can be inferred that predictability is a product of coherence in a trade regime. Predictability in the context of trade policy is the ability of potential trade partners and investors to foretell the effect of trade policies on their interaction within the trade framework of a given country. If there are inconsistencies in a trade regime, invariably predictability will be absent.

¹³⁵Oxford Dictionary, <<http://oxforddictionaries.com/definition/english/flexibility?q=flexibility>> accessed 03 June 2014.

Transparency/ Accountability

Transparency is achieved when there is openness and full participation between all stakeholders to the foreign policy formulation process. For example, the OECD recommends that in view of the global context of international trade, a commitment by all key trade stakeholders to outward-oriented regional and global strategies is required.¹³⁶ This necessitates transparency and accountability amongst all stakeholders to the process. Any actor which has the ability to affect the trade policy process who is not accommodated into the trade policy process is less accountable for their actions and this has the potential to compromise the transparency of the overall process. This is a reason why the OECD and the UN emphasise the need for all government entities at national and sub-national levels to be involved at some stage in the creation of trade and development policy.¹³⁷ It is also a reason why the WTO requires broad participation of all stakeholders such as consumer groups and local levels of government in the international trade regime of its member states.¹³⁸ In essence, the commitment of all stakeholders is necessary to achieve transparency and accountability in an ideal trade framework.

Integration

Finally, the need for 'integration' can be inferred from the recommendations of the OECD and the UNDP. Integration refers to inclusiveness in a framework. A trade regime must effectively combine the role of all the relevant stakeholders in order to achieve coherence. For example, the OECD, UNDP and the WTO recommend that on a policy level there is need for integration between a country's trade and development strategy. On an institutional level they also advocate for an effective consultation mechanism among three key sets of stakeholders: the government (national and sub-national), the Organised Private Sector (OPS) and civil society. The WTO Trade Policy Review of Nigeria in 2011 reiterates this point.¹³⁹ The report highlighted the improved consultation between the government and the OPS but

¹³⁶ OECD (2006) (n 134).

¹³⁷ *ibid*; UNDP (n 142).

¹³⁸ The 2011 WTO Trade Policy Review Report for Nigeria (n 120) 14.

¹³⁹ *ibid*.

noted that there is still an exclusion of organisations which represent consumers and *rural dwellers*.¹⁴⁰ It was recommended by the WTO that official agencies involved in the international trade process in Nigeria could improve their consultative processes and access to information and enhance trade policy development capacity.¹⁴¹ This highlights the importance of the role of SFGs for better integration of rural dwellers in Nigeria's international economic interactions.¹⁴²

In the next section, these elements will be used to critique Nigeria's international economic policy framework. The focus will be on the presence or absence of these ideals in Nigeria's extant constitutional and institutional provisions for trade and commerce.

4.7 A critique of the extant Constitutional and Institutional Framework for International Trade and Commerce in Nigeria.

On the basis of the analysis above, it will be argued in this section that there are inconsistencies between Nigeria's international economic policy directions and the requirements for full stakeholder participation under an ideal policy framework. It will be demonstrated in this section that the extant theory underpinning Nigeria's international trade framework does not mirror the recommendations considered in the previous section.

4.7.1 The Constitutional Deficiencies.

1. The Mirage of 'Safeguards' for SFGs under s 12 of the 1999 Constitution

Nigeria operates a dualist system for implementing international law.¹⁴³ Under the dualist theory, international and domestic legal commitments exist on entirely separate planes and international treaties signed by dualist states do not have

¹⁴⁰ *ibid* 14 (emphasis added).

¹⁴¹ *ibid* 14.

¹⁴² Edward T Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (2004) 25(1) *Nw J Intl L & Bus* 1, 10.

¹⁴³ David M Aaron, 'Reconsidering Dualism: The Caribbean Court of Justice and the Growing Influence of Unincorporated Treaties in Domestic Law' (2006) 6 (2) *Law & Prac Int'l Courts & Trib* 233.

domestic legal effect until they are incorporated into national law via the passage of parallel domestic legislation.¹⁴⁴ In Nigeria, this is encapsulated under s 12 of the 1999 Constitution.¹⁴⁵ The section provides inter alia: ‘No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been *enacted*¹⁴⁶ into law by the National Assembly...’¹⁴⁷ and any such domesticated treaty ‘...*shall not be enacted unless it is ratified*¹⁴⁸ by a majority of all the Houses of Assembly in the Federation.’¹⁴⁹ The last limb of this section (s 12 (3)) is presumably a safeguard intended to guarantee the participation of the SFGs and ensure that the FG has a check on its broad mandate for matters of international trade relations.¹⁵⁰ However, there is no record of this section being utilised by SFGs since its introduction under the 1979 Constitution and so its practical benefit to SFGs is questionable.¹⁵¹ Furthermore, because the NA is made up of state representatives their interests are presumably considered to be catered for under s 12 (1) through the NA.¹⁵²

Relating this to the recommendations discussed in the previous section, the UNDP report stated that one of the challenges which can militate against mainstreaming trade with development is the presence of ‘A political culture of limited participation which results in weak parliamentary processes.’¹⁵³ It is argued that this challenge is present in Nigeria’s international trade and development framework. This is evidenced by the disinterest and lack of understanding by SFGs of their

¹⁴⁴ *ibid* 235.

¹⁴⁵ C23 LFN 2004.

¹⁴⁶ Emphasis added.

¹⁴⁷ *ibid* s 12 (1).

¹⁴⁸ Emphasis added.

¹⁴⁹ *ibid* s 12 (3).

¹⁵⁰ Schütze (n 47) 112.

¹⁵¹ Gambari (n 104) 117.

¹⁵² Akindele and Oyediran (n 110) 610-611ff, 614; see also Gambari (n 160) 117.

¹⁵³ UNDP (n 146).

constitutional role in Nigeria's international trade process. For example, during the interviews conducted in Nigeria, an interviewee stated that:

It is private agencies which are involved in international trade not states per se. States do not control international trade issues constitutionally, so even if the Stakeholders Forum [the NCC] has more legal backing, it would not create any added leverage for states because states do not have a direct involvement in international trade; so asking for more powers or an improved role of SFGs under the consultative fora such as the NCC will not make any difference.¹⁵⁴

Further evidence of the disinterested stance of SFGs was expressed by another interviewee at the federal level in Abuja who stated that under the current review process of the 2002 trade policy document, drafts were sent to SFGs for their input and consideration but only 4 out of the 36 states responded accordingly. He was of the view that this may be because states do not consider issues relating to international trade of to be interest to them since the constitution excludes them from this area.¹⁵⁵

As was identified in section 1.4.5 of chapter one, there are other factors which can explain the reason for this disinterest by SFGs. For example, the lack of capacity or uneven distribution of economic wealth amongst SFGs makes it difficult for all SFGs to have the same level of participation in Nigeria's international economic interactions. In addition to these capacity deficiencies, it is argued that the existence of the mindset discussed in this section is indicative of a political culture of 'limited participation' which was identified by the UNDP as a factor militating against an effective trade policy framework. This mind-set discourages SFGs in Nigeria from utilising s 12 (3) of the 1999 Constitution as an avenue to contribute to and strengthen the parliamentary process relating to Nigeria's international economic participation.

¹⁵⁴ Personal Interview with Mr Joel - State Director for Trade, Edo State Ministry of Commerce and Industry, July 2012.

¹⁵⁵ Focus Group Discussion with Mr Bawa Lere Lawal – Deputy Director Trade; Mr Ezikpe Kalu – Assistant Director Trade, Mr Sunday Oghydi – Assistant Director, and Mr Abdul Hamid – Chief Commercial Officer at the Ministry of Trade and Investment Abuja, June 2012. (See comments of Mr Kalu).

2. The ‘Side-Doors’ being Exploited by SFGs to Circumvent the Constraints of the 1999 Constitution.

Interestingly, although the constitutional restrictions on Nigerian SFGs identified in the previous section may discourage them from engaging in the constitutional process for Nigeria’s international economic interactions, in reality SFGs still have an effect on Nigeria’s international economic relations. This is because the exigencies of the current dispensation of international economic relations has exposed cracks and loopholes which are progressively being exploited by SFGs.

The origin of this issue is rooted in the constitutional provisions of Items 18 and 30 of the CLL. Item 18 provides that: ‘Subject to the provisions of this Constitution, a House of Assembly may make Laws for that state with respect to industrial, commercial or agricultural development of the state.’ This provision has been the catalyst for state governments such as Lagos, Akwa Ibom, Ondo etc., which have been active in the international scene. Chief among these front line states is Lagos. This is not surprising because Lagos is the industrial and commercial nerve centre of Nigeria.

Since 1999, Lagos has attracted a significant amount of FDI into the state to achieve its development agenda. Interestingly, the rising profile of the state has attracted the attention of not only international private investors but also national governments. Between 2011 and 2013, the Lagos state Governor - Mr. Babatunde Fashola - has hosted trade delegates from sovereign nations comprising of high ranking officials of these countries. For example, in 2011, the British Prime Minister - David Cameron in his first official visit to Nigeria led a business delegation to Lagos state and shunned Abuja, the capital city.¹⁵⁶ Also in 2012, the Lagos state governor received the British Deputy High Commissioner to Nigeria - Mr. Peter West and discussions centered on the improvement of economic relations between Lagos and the United Kingdom.¹⁵⁷

¹⁵⁶ See ‘British PM, Cameron Visits Nigeria, Shuns Abuja!’ *The Street Journal* (Ibadan, 19 July 2011) <<http://thestreetjournal.org/2011/07/british-pm-cameron-visits-nigeria-shuns-abuja/>> accessed 4 April 2014.

¹⁵⁷ See ‘Fashola, UK Envoy Discusses Better Business Ties’ *PM News* (Lagos, 20 February 2012) <<http://www.pmnewsnigeria.com/2012/02/20/fashola-british-envoy-discuss-improvement-in-business-relations-fashola-british-envoy-discuss-improvement-in-business-relations/>> accessed 4 April 2014.

He also received the Vice Minister, Foreign Trade of the Kingdom of the Netherlands - Mr. Simon Smits - in 2012 to discuss ways to tackle the challenges posed by infrastructure deficit and coastal erosion in Lagos state.¹⁵⁸ Fashola also hosted the Russian Ambassador to Nigeria - Mr. Nickolay Udovichenko in 2013, with the Governor canvassing for mutual collaboration between Nigeria and Russia in the development of rail transportation.¹⁵⁹

As a result of the growing commercial and economic relations between Lagos and China, Lagos state recently introduced a policy which is of significant note. The Lagos state government in 2011 introduced the Mandarin language to the educational curriculum of its secondary schools. This policy is backed by the constitution because Item 30 of the CLL provides that:

Nothing in the foregoing paragraphs of this item shall be construed so as to limit the powers of a House of Assembly to make laws for the State with respect to technical, vocational, post-primary, primary or other forms of education, including the establishment of institutions for the pursuit of such education.¹⁶⁰

At face value this looks like a legitimate action carried out by Lagos state which has no foreign trade implication. But on closer analysis, it exposes an indirect means of promoting an economic agenda of the state. It is argued that the action of Lagos state is a subtle exploitation of a loophole in the constitution to foster its international economic relations with another sovereign nation. **This policy action** points to a reoccurrence of what was obtainable during the first republic. It is evident from the recent activities of Lagos that the use of constitutional side doors has re-emerged.

It is the view in this thesis that there is a difference in these recent episodes of state expression in the international scene via constitutional side doors which can be

¹⁵⁸ See 'Lagos, Netherlands Seek Partnership to Tackle Infrastructure, Environmental Challenges' Naira Land Forum, 8 March 2012 <<http://www.tundefashola.com/archives/news/2012/03/06/20120306N01.html>> accessed 4 April 2014.

¹⁵⁹ See 'Fashola Makes Case for Nigeria-Russia Cooperation in Railway Development' <<http://www.lagosstate.gov.ng/news2.php?k=2902>> accessed 4 April 2014.

¹⁶⁰ Nigerian 1999 Constitution (n 111).

distinguished from the earlier episodes. As was identified by Akindele and Oyediran, the pre-occupation with ethnic allegiance and regional identities strongly influenced the character of the early Nigerian state. Thus, the constitutional ambivalence which made it possible for the regions to chart conflicting foreign policy objectives with the central government were attributable to regional politics and its impact on the dynamics of the Nigerian federalism. Although regional politics is not a thing of the past in the Nigerian federalism, it is argued that the current episode of states expressing themselves via side doors in the constitutional provisions is spurred on by the economic aspirations of SFGs and the fact that the current dispensation of international economic relations is very attractive and easily accessible to any SFG seeking to achieve economic and or political aims. In essence, even though the constitutional conditions under the 1960 and 1963 Constitutions were more conducive for active participation in foreign economic policy as against the 1979 and 1999 Constitutions, the re- emergence of the use of side doors by SFGs is testament to the inability of the constitution to suppress states that are bent on expressing themselves on the international scene.

These episodes raise a lot of questions about the recent contribution of SFGs in Nigeria to international economic relations. Although, most of the activities of Lagos state are taking on an international dimension, the constraints of the extant constitutional stance on foreign policy still makes their activities *prima facie* unconstitutional. However, as Akindele and Oyediran aver:

In the literature on federalism, there is an increasing awareness that the explanation for the vitality, decay, or death of a federal political arrangement is ultimately to be sought not in the dry bones of formal constitutional law but in the nature and character of the instrumentalities through which power is actually exercised in the political system.¹⁶¹

Thus, the activities of Lagos state represent a significant manifestation of the changing realities of Nigeria's international economic interactions. It could be explained as an inevitable occurrence in a globalised world economy and/or a welcome development in view of the contribution of these SFG activities to

¹⁶¹ Akindele and Oyediran (n 161).

economic growth and development in Nigeria. However, it is clear that these occurrences are not yet reflected in the extant constitutional and institutional framework in place.

These deficiencies mirror the lack of **flexibility** in the extant constitutional framework because the limitations on the constitutional powers of SFGs run contrary to the recommendations of the OECD and the UNDP which have recognised the importance of SFGs in the attainment of trade policy objectives. Also, the examples of constitutional limitations cited above demonstrate the lack of **coherence** within Nigeria's international economic policy framework. The use of side-doors by SFGs is evidence that their constitutional exclusion has not deterred them from participating in Nigeria's international economic relations but has given them leeway to resort to loopholes and grey areas in the constitution.

This situation leaves room for conflicting policies between SFGs and the FG which hinders coherence and erodes the **predictability** of Nigeria's trade regime. This constitutional restriction also affects **transparency** and **accountability** because the non-recognition of SFGs under international law gives them a unique role which can be either advantageous or disadvantageous. For example, an advantage of non-formal recognition is that SFGs can capitalise on a status as 'sovereignty-free' actors not constrained by the trappings of statehood.¹⁶² according to Hocking, 'By exploring the boundaries between the conventional but often misleading distinctions between state and non-state actors, they [SFGs] have been able to play a variety of roles in several political arenas.'¹⁶³ The downside to this non-formal recognition of SFGs is the ability to escape accountability for their actions and also to erode the transparency of the overall trade process by engaging in policy action which runs counter to the policy direction of the FG. The probability of this disadvantage occurring in Nigeria is evident in the constitutional circumstances described above. The use of side-doors by states has the potential to increase because SFGs are keen to achieve their developmental objectives irrespective of their constitutional limitations. If they are allowed to continue in these circumstances, it is arguable that they will

¹⁶² Brian Hocking, 'Bridging Boundaries: Creating Linkages: Non-Central Governments and Multilayered Policy Environments' (1996) 11 *WeltTrends* Nr 36, 40.

¹⁶³ *ibid.*

constitute a hindrance to the attainment of transparency and accountability in Nigeria's international economic regime.

These constitutional restrictions also demonstrate the lack of **integration** (inclusiveness) of the extant international economic framework in Nigeria. In 2003, the FG emphasised its commitment to integrating the FG and SFGs in Nigeria's development agenda under the NEEDS/SEEDS platform. However, it is argued that the constitutional framework under the 1999 Constitution does not provide a conducive environment for integration of '*all*' stakeholders in the trade-development agenda. The fact that SFGs are limited to using loopholes to achieve their development agenda does not reflect a commitment by the FG to achieving a truly inclusive framework.

In the next section it will be pointed out that the FG's idea of achieving co-operation between the stakeholders was only tailored to accommodate the FG and the OPS. This is contrary to the recommendations of the OECD which advocates the full participation of the FG, SFGs and the OPS.

4.7.2 The Institutional Deficiencies: A Critique of the Extant Institutional Linkage between SFGs and the FG

The NTPD was introduced in 2002 with an objective of re-positioning Nigeria's trade regime to take advantage of the changing global economic system.¹⁶⁴ The NTPD was designed to disengage the government from business activities and empower the OPS to be the engine of Nigeria's economic growth.¹⁶⁵ However, a purview of the NTPD shows that it is not a realistic aim. Ogunkola and Bankole reiterate this view by pointing out inconsistencies between what is stated in the NTPD and what is actually obtainable in practice.¹⁶⁶ Their study focused on the problems associated with Nigeria's import prohibition policies and they summarised these issues and the failings of the NTPD in this regard thus:

¹⁶⁴ NTPD 2002 (n 129).

¹⁶⁵ *ibid* 5.

¹⁶⁶ Ademola O Ogunkola and A Bankole, 'Import Prohibition as a Trade Policy Instrument: The Nigerian Experience' *Managing the Challenges of WTO Participation: Case Study 32* <http://www.wto.org/english/res_e/booksp_e/casestudies_e/case32_e.htm> accessed 07 June 2014.

Several lessons can be drawn from Nigeria's import prohibition policy experience. Perhaps the most general of these is that the coherent and consistent pursuit of good trade policy requires not only a robust and appropriate domestic institutional framework and process for trade policy-making but also a supportive and institutionalized multilateral arrangement for trade policy surveillance. Weaknesses in both of these may be responsible, in varying degrees, for the persistence of Nigeria's import prohibition policy. Nigeria's internal trade policy surveillance mechanism consists largely of the domestic framework and trade policy-making process, both articulated at length in the *Trade Policy of Nigeria* (Federal Ministry of Commerce 2002). However, the country's actual trade policy-making deviates quite substantially from what this document stipulates. These deviations largely explain the lack of coherence between policy statements and policy actions; this probably also derives from the absence of local ownership of the trade liberalization policy which appears to have been induced by the World Bank-IMF supported structural adjustment programme.¹⁶⁷

In addition to these general flaws pointed out above, it is also noticeable that the reference to a re-positioning strategy in the NTPD 2002 does not take cognisance of all the dimensions of the said changes occurring in the global system.¹⁶⁸ For example, the NTPD does not reflect the changing patterns in governance structures which are a distinct characteristic of the current multileveled global economic system. More specifically, the NTPD does take cognisance of the fact that the changing structure of global governance is not totally market driven but now encompasses a combination of both private market forces and institutional regulators (state and non-state alike).¹⁶⁹

From this perspective, it is argued that the extant institutional framework for trade policy in Nigeria is deficient because it is not **flexible** enough to accommodate SFGs

¹⁶⁷ *ibid.*

¹⁶⁸ NTPD 2002 (n 174) i-ii (Forward Note) ff, 4-5.

¹⁶⁹ See chapter three, section 3.2.

as a key component in the policy process. This lack of flexibility makes the extant framework **incoherent** because as was demonstrated with the examples in the previous section, Nigeria's SFGs are growing in prominence on the international economic scene. Therefore, their exclusion from the institutional framework for international economic relations creates opportunities for inconsistent policies between them and the FG. It will also be demonstrated below from an analysis of the NTPD that the extant institutional framework is not **inclusive** because it excludes SFGs from key areas which are important for achieving coherence between trade and development objectives in Nigeria.

Evidence to support these claims made above is found in the NTPD 2002. For example, section 2 of the NTPD provides for the 'trade policy framework'.¹⁷⁰ It states that the objective of Nigerian trade policy is to 'encourage the production and distribution of goods and services to satisfy domestic and international markets; for the purpose of achieving and accelerating economic growth and development.'¹⁷¹ In order to achieve this objective, it is asserted that Nigeria's trade policy 'must be supported by domestic policies which foster innovation, **predictability**, **transparency**, rule of law and international competitiveness and should be implemented in a pragmatic and **flexible** manner.'¹⁷² However, Section 6.2 of the NTPD 2002 which provides for the '**implementation strategy [action plan]**' in Nigeria's international trade regime contradicts the objectives cited above.¹⁷³

From the criteria identified in section 4.6.1, it was pointed out that SFGs are important stakeholders for effectively linking trade and development objectives. In this regard, the NTPD deficient because the only subject matter on which SFGs are a designated implementation agency is on the acquisition of land.¹⁷⁴ On every other

¹⁷⁰ NTPD 2002 (n 177) 4-23.

¹⁷¹ NTPD 2002 (n 179) 4.

¹⁷² *ibid.*

¹⁷³ *ibid* 83-104.

¹⁷⁴ This is as a consequence of the direct powers given to state governments to hold land in trust for the Nigerian citizens. Section 6.2.5 NTPD 2002 (n 182) 101.

subject matter under the ‘action plan’, SFGs are excluded. For example under section 6.2.1 of the NTPD 2002 (Policy Process):¹⁷⁵

(Table 1) Source: The NTPD, 2002

SI N	IDENTIFIED PROBLEM	RECOMMENDE D SOLUTION/ IMPLEMENTATI ON STRATEGY	IMPLEMENTATI ON TIME FRAME	IMPLEMENTATI ON AGENCY
1.	Conflicts that engender – misunderstanding and lack of cooperation among various agencies	Reach out to all stakeholders all through the preparatory stages	Short Term	FG/OPS

From **Table 1** we see that SFGs are excluded as an implementation agency for the recommended solution. Based on the recommendations of the OECD and UNDP identified earlier, it is argued that SFGs ought to be included as an implementation agency.¹⁷⁶ This is because conflicts and misunderstanding in the trade policy process referred to in **Table 1** arise within SFGs as frequently as any of the other two designated implementation agencies. Therefore, consultation and linkage between national and local structures as recommended by the OECD and UNDP is vital in this regard. Furthermore, the exclusion of SFGs on this point contradicts the position adopted by the FG under the NEEDS/SEEDS development agenda of 2003; where it was claimed that the FG recognised the importance of intergovernmental cooperation and the location of policy implementation in the lower levels (i.e. states) of

¹⁷⁵ *ibid* 83.

¹⁷⁶ See OECD (2006) (n 145); UNDP (n 162).

government.¹⁷⁷ From **Table 1** we see that the FG's idea of reaching out to 'all stakeholders' excludes SFGs.

An interviewee in Edo state flagged up an example of the conflicts which could arise due to lack of cooperation between the FG and SFGs in relation to international trade. According to the interviewee, most of the ECOWAS protocols and agreements signed by Nigeria are done by consultation with technocrats within the ECOWAS commission and within the ENFP forum which excludes SFGs. He said that SFGs are not consulted on how these agreements affect them. He said that what are reported to the NCC are the decisions reached after deliberation stages at the ministerial or secretarial level. He said a consequence of this process is that ECOWAS rules are not operational and/or beneficial to trade actors within Nigeria. He gave the example that there is no free passage of goods for Nigerian traders in spite of the agreements signed. According to him, Nigerian traders are made to seek further certifications within each member state of ECOWAS. He was of the view that because some of the regional interactions in which Nigeria is involved have far reaching implications on trade actors located within SFGs, their involvement at the deliberation stages of these regional interactions would better place SFGs to discover problems at the grassroots; thereby facilitating the proper dissemination of information and advising potential exporters and those involved in the export chain.

(Table 2) Source: The NTPD, 2002

SI N	IDENTIFIED PROBLEM	RECOMMENDED SOLUTION/ IMPLEMENTATION STRATEGY	IMPLEMENTATION TIME FRAME	IMPLEMENTATION AGENCY
1.	Lack of stable environment for long term policy	Involve all agencies and stakeholders in the design of coherent appropriate policy framework/initiative	Short Term	FG/FMC/OPS/FMS T

¹⁷⁷ See 'text to n 118'.

	decisions	es		
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Table 2 above refers to the need for a stable environment when taking long term policy decisions.¹⁷⁸ Once again, SFGs are excluded as a designated implementation agency. This contradicts the recommended working criteria discussed earlier which emphasises the importance of incorporating ‘all relevant stakeholders’ (government and private actors) in an ideal policy cycle.¹⁷⁹ This also contradicts the recommended solution/implementation strategy stated above in **Table 2** which claims to ‘involve all agencies and stakeholders in the design of coherent appropriate policy framework/initiatives.’¹⁸⁰ It is difficult to imagine how coherence can be achieved if SFGs are not factored into any policy action recommended in **Table 2**.

(Table 3) Source: The NTPD, 2002

S/ N	IDENTIFIED PROBLEM	RECOMMENDED SOLUTION/ IMPLEMENTATI ON STRATEGY	IMPLEMENTATI ON TIME FRAME	IMPLEMENTATI ON AGENCY
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¹⁷⁸ See NTPD 2002 (n 184) 83.

¹⁷⁹ See OECD (2006) (n 134) 8.

¹⁸⁰ NTPD 2002 (n 178).

1.	Need to strengthen national capacity in the formulation and implementation of the policies.	Information system on trade control measures (TCMIS and SMART) installed in micro-computers for staff and exporters	Short Term	FG/FMC/OPS
		Capacity building for officials and core groups of exporters;	Short Term	FG/FMC/OPS

In the scenario in **Table 3**, SFGs are again excluded.¹⁸¹ The contradiction in their exclusion in this aspect of the policy process is that SFGs are the physical location where implementation of any multilateral or regional agreement occurs. Thus, the need to strengthen national capacity in the formulation and implementation of trade policies requires the input of SFGs. The role of the OPS in this regard is understandable as they are the primary actors in international trade. However, the exclusion of SFGs which have the closest physical proximity to the exporters is tantamount to denying the very existence of SFGs as the physical location for all trade process conducted in Nigeria.

¹⁸¹ *ibid* 84.

Table 4 below which is the structure for export promotion under the NTPD gives more examples of shortcomings due to the exclusion of SFGs.¹⁸²

(Table 4) Source: The NTPD, 2002

SI N	IDENTIFIED PROBLEM	RECOMMENDED SOLUTION/ IMPLEMENTATION STRATEGY	IMPLEMENTATION TIME FRAME	IMPLEMENTATION AGENCY
1.	Lack of international standardisation of Nigerian products.	Encourage products for export to be graded and disinfected and non-compliance to attract sanction	Short Term	FG/FMC/OPS
		Mutual international cooperation and recognition of certificates with our trading partners.	Short Term	FPIS/SON/NAFDAC
		Set up an inter-ministerial, intergovernmental and inter agency committee to deal with the issue of trade barriers on the	Short Term	FG/FMI/SON/FMC

¹⁸² ibid 87-90.

		road;		
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The issue of standardisation of goods for export was discussed in section 4.2.2.¹⁸³ It also came up during the interview in Abuja. One of the questions put to the respondents was:

Considering the growing complexity within the international trade regulatory environment – with the current tussle for prominence between multilateralism and regionalism, do you think that a centralised or a decentralised policy formulation structure is best suited to help Nigeria effectively achieve improved and meaningful participation in international trade?

The 2nd Participant was of the view that a centralised system is better for Nigeria because SFGs would be unable to handle such responsibilities due to the fact that they would create confusion and inconsistencies which the FG would eventually still have to take responsibility for. He cited the example of standards which in his opinion would be inconsistent if SFGs were allowed to make policy on this matter. He argued that this is an example of a policy which is best regulated by the FG. The 1st Participant however disagreed with the views expressed by the 2nd Participant on the standards example. He argued that standards on cotton exported from Nigeria (which has in recent times been rejected for being substandard)¹⁸⁴ is a consequence of the centralisation of the standards process and the abolition of the role of SFGs in the standards process through the instrumentality of Commodities Boards.¹⁸⁵ He argued that when the Commodities Boards were in charge, the quality of cotton was

¹⁸³ *ibid* 90.

¹⁸⁴ J Adegboye Adeyemo and Abiodun S Bankole, 'Standards, Technical Regulation and Product Quality' in JS Wilson and VO Abiola (eds), *Standards and Global Trade: A Voice for Africa* (World Bank Publications, 2003) 212

¹⁸⁵ *ibid*. See section 4.2.1 for discussions about the shared responsibilities between the regions and the FG on matters of international economic interactions under the 1960 and 1963 Constitutions.

ascertained by grading the cotton at state level before it was sold to merchants for onward exportation. However, with the abolition of this process, merchants now buy from the cotton farmers directly – bypassing the grading process which was done at the state level – and then the Standard Organisation of Nigeria (SON) does a centralised sampling process to ascertain quality at the ports. He argued that the quality of the cotton exported has significantly dropped with the new process because the SON agents at the port find it difficult to do a thorough job due to the vast quantity they have to go through.

The argument here is that it is not practical for either SFGs or the central government to handle standardisation singlehandedly. In view of the problem identified in **Table 4**, it is only sensible that cooperation should be encouraged between all the stakeholders (including SFGs) to achieve the recommended solutions. Although uniformity is crucial to the attainment of standardisation, an approach which excludes the SFGs makes it difficult for a culture of quality to reach the grassroots.

(Table 5) Source: The NTPD, 2002

SI N	IDENTIFIED PROBLEM	RECOMMENDED SOLUTION/ IMPLEMENTATION STRATEGY	IMPLEMENTATION TIME FRAME	IMPLEMENTATION AGENCY
1.	Need for concrete attempt at enhancing agricultural, industrial, solid mineral and service sectors in the non-oil	<i>Attract foreign investment in export oriented industries which will enhance product development and diversification (emphasis added)</i> <i>NEPC shall be the</i>	Short/Medium Term	NIPC/NEPC/ NEPZA/Commercial Desks Abroad

	sector for domestic and foreign markets	<i>one stop Agency for the administration of export incentives in Nigeria</i> (emphasis added)	Short Term	FG/ NEPC/FMC
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In **Table 5**, two of the recommended solutions under the Trade Support Infrastructure framework of the NTPD have been selected for appraisal.¹⁸⁶ It is argued that the recommended solutions to the problem mentioned in **Table 5** ought to include SFGs because these two areas have become priority areas for SFGs interested in meeting their development goals. From the empirical evidence which has been considered in this thesis about the growing prominence of SFGs in FDI promotion, it is only practical that they should be involved in the process as implementing agents.

To buttress this point, the recent policies of active states such as Lagos and Cross Rivers have been the driving force in the resurgence of the non-oil sector in Nigeria. For example, Lagos in the past eight years under the leadership of Governor Fashola has created a vibrant economic environment in Lagos which has facilitated the growth of the non- oil sector of the Nigerian economy. Lagos state has been at the forefront of the Public Private Partnerships (PPPs) drive in Nigeria. Thus it is argued that the exclusion of SFGs as a policy implementation agency is a shortcoming because the SFGs which have been proactive in the development of their respective

¹⁸⁶ NTPD 2002 (n 192) 97.

areas of comparative advantage have had to work within the constraints arising from their exclusion under the implementation framework of the NTPD.

(Table 6) Source: The NTPD, 2002

Sl No	Identified Problem	Recommended Solution/ Implementation Strategy	Implementation Time Frame	Implementing Agency
1.	Need to achieve a regulatory environment conducive for trade	<p><i>Promote trade liberalisation and competitiveness while at the same time putting in place appropriate measures to safeguard the interest of domestic producers against influx of imports and unfair trade practices</i>(emphasis added)</p> <p><i>Promote a conducive environment for foreign investment in export-based commodities and services</i> (emphasis added)</p>	Short Term	FG/FMC/FMI/OPS
			Short Term	FG/OPS

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The points mentioned in **Table 6** are part of the recommendations of the NTPD under the Regulatory Framework.¹⁸⁷ It is argued that the two solutions mentioned are deficient because they do not take cognisance of the importance of SFGs in the regulation of international trade matters. Excluding SFGs which are closest to the exporters is questionable in view of the fact that SFGs have the regulatory capacity to disrupt any international trade obligation which Nigeria is bound to adhere to. Irrespective of the standard federal compliance clause which is inserted in most international economic agreements, SFGs through their legislative activity can hamper the effectiveness of Nigeria's international economic process if they are not incorporated into the framework. A good example of this is when SFGs implement a tax regime which adversely affects the ease of doing business for foreign investors. Considering that SFGs have this capacity in Nigeria, it is only logical that they should be part of the implementation agency responsible for ensuring that the regulatory regime for international trade in Nigeria achieves the policy objectives in the action plan. Other significant institutional shortcomings identifiable under the current framework include the low priority level of the NCC, the lack of quality representation for SFGs under the forum of the National Assembly (NA) and the exclusion of SFGs from the ENFP. In line with the criteria adopted in this chapter, it is argued that the exclusion of SFGs and the low priority level given to them under these three forums is an indication of the deficiency of the current institutional setup. It has repeatedly been reiterated in the course of this section that the OECD, UNDP

¹⁸⁷ *ibid* 102-103.

and WTO have in their recommendations emphasised the importance of cooperation amongst all stakeholders to the trade and development process. An inference from these recommendations is that intergovernmental cooperation is a priority in this dispensation of international economic relations. However in Nigeria, under the current framework, the fora where SFGs have an input on Nigeria's international economic process are not accorded this recommended priority level.

In chapter six, the inadequacy of the cooperation measures under the NCC, NA and ENFP will be discussed more exhaustively.¹⁸⁸ The reason why they are better treated in chapter six is because a consideration of their shortcomings is directly correlated to the recommendations needed to correct these deficiencies. Furthermore, this thesis will consider the theoretical issues (central exclusivity and cooperative federalism) in chapter five which will form the basis for a more insightful critique and reform of these three fora in chapter six. For now, it suffices to say that the general setup for international economic interactions in Nigeria has deviated from the principles of cooperation which existed at independence. The current setup is at variance with sound recommendations from international organisations which advocate a system similar to that in existence in the first republic.

These examples from the international trade and commerce sector which have been analysed above are not exhaustive of the shortcomings arising from the exclusion of SFGs from the implementation strategy/action plan of Nigeria's international economic framework. However, the rundown of the implementation agencies listed above demonstrates that the FG and the OPS are the central focus of Nigeria's international economic regime. It also demonstrates that the extant framework does not reflect the emerging trends of Nigeria's SFGs activities in international economic relations.

The exclusion of the SFGs in the areas identified above is reflective of the FG plenary powers in relation to Nigeria's international economic interactions. It is argued that the FG having such dominant control is counter-productive because the sheer magnitude of the task required to run a stable, coherent and efficient international economic policy regime (especially in the current dispensation of

¹⁸⁸ See chapter six, section 6.3.5.

international economic relations) cannot be handled solely by one level of government. This has been recognised by the OECD and UNDP, which rightly advocate the need for a framework which encompasses all stakeholders to the process. In contrast, the centralisation of international economic process in Nigeria makes SFGs totally dependent on the FG. This does not encourage most SFGs in Nigeria to be proactive and efficient in the maximisation of their potential. This attitude is similar to the political culture of 'limited participation' which was identified earlier in section 4.7.1.

In institutional terms, the existence of this mind set has far reaching negative implications on the aspirations of the Nigerian State to actualise economic development via the instrumentality of international trade and commerce; SFGs who are constitutionally excluded do not have the zeal to push forward their areas of comparative advantage from potential to actualisation because they are made to believe that it is not within their constitutional job description. They have come to believe that the FG knows what is best for them. The danger with this assumption that the FG knows best is the fact that the federal agencies such as the Nigerian Export Promotion Council (NEPC) which are burdened with the responsibility of charting and dictating the economic fortunes of the 36 states of the country have a limited capacity (political, technical and financial) and therefore lack the ability to guarantee an effective utilisation and maximisation of the potential which exists in abundance within each state.

More so, the existing mind-set is a handicap to SFGs which psychologically would have been better placed to maximise their potential if it was not taken out of their hands by the existing constitutional configuration. This is not helped by the fact that SFGs in Nigeria are not constitutionally encouraged to look inwards to harness their potentials which could transform their fortunes and consequently translate to a more competitive outlook of Nigeria's participation in international economic relations.

The role of Nigeria's SFGs under the NTPD is restricted to one objective: 'The maintenance of a virile and effective trade extension service... and the promotion of buying and selling using private operators.'¹⁸⁹ Ironically, there is no indication that

¹⁸⁹ *ibid* 70.

they have a say in the actualisation of the role they are supposed to be primarily responsible for.

4.8 Conclusion

The arguments in this chapter have sought to establish the significance of the relationship between the development of federalism in Nigeria and the evolution of constitutional and institutional provisions for Nigeria's international economic interactions. The chapter considered the historical evolution of federalism in Nigeria and revealed a noticeable shift from a structure of shared competence between the FG and SFGs (regions as they were called from 1960 – 1967) on foreign trade policy under the 1960 and 1963 Constitutions to a structure of central exclusivity in favour of the FG from 1966 to 2013. It was identified that the shift from shared competence to central exclusivity began in 1966, when Nigeria's political structure became influenced by the unitary structure of government favoured and perpetuated by the military which ruled the country intermittently for about 30 years until May 1999. It was argued that the military's unitary style has influenced the extant framework (constitutional and institutional) which favours a dominant FG in international economic interactions.

It was also identified in this chapter that the extant framework is operating contrary to the minimum ideals of an international trade framework as recommended by international organisations such as the OECD, WTO and UNDP. The evaluation of the extant framework in line with working criteria (flexibility, coherence, transparency, accountability and integration) adopted from the recommendations of these organisations exposed contradictions and deficiencies in the existing constitutional and institutional framework for international trade in Nigeria. More particularly, the evaluation identified the exclusion of SFGs in Nigeria which are regarded as important stakeholders for the attainment of an ideal international trade and development framework.

Chapter Five: A Theoretical Basis for the Role of SFGs in Nigeria's International Economic Interactions: An Appraisal of Two Constitutional Viewpoints (Central Exclusivity and Cooperative Federalism).

5.1 Introduction.

In chapter three, a proposition was introduced that the dynamics of international economic relations (including the international trade system) has been altered significantly due to geo-political circumstances such as globalisation.¹ These changes in the dynamics of the international economic system were viewed within the context of an evolving relationship between multilateralism and regionalism (RTAs) in international trade.² From this perspective, it has been argued that the new dispensation of international economic relations is characterised by an expansion of multilateralism into disciplines which were hitherto within the exclusive competence of national governments and the resurgence of a new wave of regionalism which is dynamic in nature and expansive in scope.³

In relation to the hypotheses outlined in chapter one, the arguments of this thesis have so far sought to establish a link between the evolving international economic system and Nigeria's internal framework for international economic policy.⁴ In chapter one and four of this thesis, the empirical evidence which points to an increased presence of Nigerian SFGs on the international scene was considered.⁵ It was argued that the totality of the evidence highlights a changing dynamic in Nigeria's international economic interactions.⁶ However, it was also outlined in chapter four that in as much as the participation of Nigeria's SFGs in international activities is on the increase, the existing constitutional and institutional framework is

¹ See generally chapter three, section 3.2.

² See chapter three, section 3.3.

³ See chapter three, section 3.3.1 and 3.3.2.

⁴ See chapter one, section 1.3.

⁵ These international engagements by SFGs in Nigeria are discussed in depth in chapter one and four.

⁶ See chapter one, section 1.2.2 and chapter four, section 4.7.1.

still at variance with the emerging phenomenon.⁷ It was identified that in Nigeria, foreign relations is rigidly conceptualised as an area which is exempted from the dictates of the federal process.⁸ It was further argued that the inconsistency between the emerging role of Nigeria's SFGs in international relations and the extant constitutional/institutional framework creates a divergence between theory and reality.⁹ The conclusion reached is that the current constitutional and institutional framework for Nigeria's international interactions does not align with the realities of the evolving international economic system and therefore is in need of change.¹⁰

In chapter one, cooperative federalism was introduced as an alternative theory to central exclusivity in foreign relations.¹¹ Cooperative federalism was distinguished from the mainstream revisionist views because cooperative federalism seeks complementary competence rather than concurrent competence for SFGs in international relations.¹²

In this chapter, the existing status quo (central exclusivity) and an alternative option of cooperative federalism will be appraised from a constitutional federalism perspective so as to identify which viewpoint is best suited to cater for the role of SFGs in Nigeria's international economic interactions under the current dispensation of international economic relations.

A plethora of neologisms have developed within the Constitutional and International Political Economy (IPE) literature which rationalise and critique this emerging

⁷ See chapter four, section 4.2-4.5.

⁸ See generally chapter four, section 4.2-4.5 for discussions on how the centralisation of the political system in Nigeria between 1960 and 1999, especially during the years of military rule, has contributed to an entrenchment of plenary powers for the federal government in Nigeria's foreign relations.

⁹ See chapter four, section 4.7.

¹⁰ Edward T Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (2004) 25(1) *Nw J Intl L & Bus* 1, 8. Hayes supports this view stating that the orthodox constitutional doctrine of central exclusivity in foreign relations has increasingly come under scrutiny due to changes in the international economic system. See also See JH Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97 *Am J Intl L* 782.

¹¹ See chapter one, section 1.1.

¹² See chapter one, section 1.1.

phenomenon in foreign affairs federalism.¹³ As such, it was a challenge finding an appropriate framework which captures the context of this investigation. The justification for selecting the two theories under the constitutional federalism discipline is because they directly address the allocation of powers between the central government and SFGs on matters relating to international economic relations. Although the main focus of the discourse is constitutional, this chapter will be drawing from applicable parallels which can be gleaned from a general understanding of the theoretical perspectives of the other disciplines which have not been selected as the main focus of this investigation. There is interconnectivity between the multidisciplinary theoretical dimensions of the activities of SFGs in the area of foreign relations which in the context of this investigation can be traced to a common denominator- the changing landscape of international relations. For example, theories on regulation which include harmonisation and decentralisation are useful for understanding the changing dynamics of foreign affairs federalism. The reason why this disciplinary perspective has not been selected as the central focus for this thesis is because regulatory theory places emphasis on competence of actors involved in the provision of public goods within a nation-state. This is applicable to federal and unitary systems alike but the perspective of this thesis is different because it focuses on constitutional and institutional competences of domestic institutions involved in foreign relations which are peculiar to federal systems alone. However, concepts such as ‘sub-optimal’ and ‘optimal’ regulation will be considered during the appraisal of the constitutional theories because they are important yardsticks for ascertaining the functional merits and demerits of the constitutional theories under consideration.¹⁴

¹³ See chapter one, section 1.4.4 for discussions on other IPE theories which have informed the theoretical underpinning of this thesis.

¹⁴ For an in-depth discussion on regulatory theories, see generally Francesco Parisi, ‘Two Dimensions of Regulatory Competition’ (2006) 26 *Int Rev L & Econs* 56; D Geradin and JA McCahery, ‘Regulatory Co-opetition: Transcending the Regulatory Competition Debate’ (2005) TILEC Discussion Paper (DP 2005-020).

5.2 Two Theoretical Viewpoints on the Constitutional Allocation of Foreign Affairs Powers in Federal Systems.

Central exclusivity is a situation where the central government has exclusive jurisdiction on matters of international relations.¹⁵ This represents the orthodox position in foreign affairs federalism. In the US, this view point is encapsulated under the pre-emption¹⁶ and dormant foreign affairs doctrine.¹⁷ The second view point - cooperative federalism - represents an alternative approach which advocates cooperation and joint participation in a federal setup on matters of international relations within a shared legal sphere.¹⁸

These two viewpoints can also be categorised into broader headings of dual federalism (central exclusivists) and ‘non – dual’ federalism (cooperative federalism).¹⁹

A significant hallmark of the dualist federal model is the two-way compartmentalisation of regulatory competence and allocation of constitutional powers between levels of government.²⁰ Dualism seeks to protect the core of plenary control entrusted to each component of the two levels of government in a federal setup. Overlap might only be tolerated at the periphery; but in the core areas, the idea

¹⁵ See chapter one, section 1.1 for the origin of the terminology. See also Matthew Schaefer ‘Federal States in the Broader World’ (2001) 27 CAN-US LJ 35.

¹⁶ The pre-emption doctrine is a constitutional method of exclusion in the US Constitution which ensures that ‘where the federal government exercised its power, the supremacy clause would guarantee that the federal law prevailed over conflicting state law.’ See Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009) 95.

¹⁷ The Dormant Foreign Affairs doctrine refers to the power over foreign affairs arising from the amalgam of clauses which reserve foreign affairs powers exclusively for the federal government to the exclusion of states and municipalities in the US. See Matthew Schaefer, ‘Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine’ (2011) Seton Hall L Rev 202, 204.

¹⁸ Christopher K Bader, ‘A Dynamic Defense of Cooperative Federalism’ (2014) 35 Whittier L Rev (Forthcoming) 4 <<http://dx.doi.org/10.2139/ssrn.2189920>> accessed 31 July 2013.

¹⁹ ‘Non – dual’ federalism is used in the context of an alternative to dual federalism which consists of a pluralistic categorisation of federalism comprising of more than one model. See generally Schütze (n 16).

²⁰ *ibid* 77.

of one-and-only-one sovereign is maintained.²¹ On the other hand, ‘non – dual’ federalism theories are the alternative models of federalism which have emerged as a replacement for dual federalism in the new era of international relations. ‘Non – dual’ federalism models are characterised by a framework which places less emphasis on a regimented compartmentalisation of powers between levels of government.²²

Under the ‘non – dual’ framework, there are a plethora of theoretical variants such as polyphonic federalism,²³ reflexive harmonisation,²⁴ ‘the two level game’ theory,²⁵ the ‘second image reversed’ approach²⁶ and cooperative federalism.²⁷ Although these theories share normative similarities, cooperative federalism has been selected under the ‘non – dual’ category because it has an appeal of simplicity in its application which is crucial for the case study Nigeria. Cooperative federalism is more malleable

²¹ Bader (n 18) 7.

²² Scholars such as Schapiro, Bader and Schütze have argued that dual federalism has become extinct in light of the changing landscape of international relations and the federal process. They have advocated the merits of alternative theories under the dynamic model of federalism as fitting for the new dispensation of federal relations. While Schapiro advocates for a polyphonic model of federalism, Bader and Schütze favour the merits of cooperative federalism as a successor to dual federalism.

²³ Schapiro is a leading proponent of the Polyphonic conceptualisation of federalism. Under this model, competing values are used as a yardstick when deciding whether to site authority at the state or federal levels, or both. Dialogue, redundancy, and plurality are best promoted by state regulation, whereas uniformity, accountability, and finality find expression in federal control. See generally Robert A Schapiro, ‘Polyphonic Federalism: State Constitutions in Federal Courts’ (1999) 87 (6) Cal L Rev 1409.

²⁴ This model is a form of alternative governance theory which focuses on multilevel governance structures and is peculiar to the European Union. Deakin is a leading proponent of this theory. Reflexive harmonisation focuses on the allocation of regulatory competence in the EU relying on a remodelling of the Tieboutian model of regulatory competition to achieve a learning process between levels of government which is dependent on norms that establish a balance between ‘particular’ and ‘general’ mechanisms. See Simon Deakin, ‘Legal Diversity and Regulatory Competition: Which Model for Europe?’ (2006) 12(4) ELJ 440.

²⁵ Putman is the leading proponent of this theory. This theory analyses the intersection between domestic and international regimes and its impact on the policy choices made at both the domestic and international levels. Putman focuses on the impact of domestic ‘win sets’ and the opportunities and constraints which these factors have on international negotiations. See generally, Robert D Putman, ‘Diplomacy and Domestic Politics: The Logic of Two-Level Games’ (1988) 42(3) IO 427.

²⁶ Gourevitch is the leading proponent of this theory. It focuses on the influence of domestic considerations e.g. bureaucratic factors and transnational actors, in the internal/external relationship between a state and international regimes. See Peter Gourevitch, ‘The Second Image Reversed: The International Sources of Domestic Politics’ (1978) 32 (4) IO 881.

²⁷ Schütze and Bader are leading proponents of cooperative federalism. Their views will be expounded upon in the course of this chapter.

and can effectively utilise the existing formal and informal channels in Nigeria's international economic regime lowering the chances of complications arising.²⁸

The two theoretical viewpoints selected for appraisal in this thesis will now be systematically considered in turn so as to identify the origin, rationale, strengths and weaknesses of the two viewpoints in relation to the context of this research.

5.3 Central Exclusivity in International Economic Relations: The US Experience.

The constitutional framework for central exclusivity in the Nigerian federal system is modelled after the system in the US, which is the oldest federal system in the world. Thus the US will be used as the yardstick for explaining the origin and evolution of this constitutional principle.²⁹

5.3.1 Origin of Central Exclusivity.

Justice Sutherland in *United States v Curtiss – Wright Export Corps*³⁰ opined that the federal government in the US inherited the power to act exclusively on matters of foreign interactions from the British Crown upon the attainment of independence. He argued that the Crown passed on the power of external sovereignty which includes the power to levy war, conclude peace etc. to the colonies as a collective unit rather than to each individual colony.³¹ Schütze also points out that at the inception of the American Union, foreign affairs were always of central concern to the American

²⁸ According to Bader one of the advantages of cooperative federalism over other models of federalism applicable under a new dispensation of federal relations is that it: '...invites dialogue on multiple interconnected planes, including during the adoption of law through the political process and the formulation and enforcement of state-specific implementation strategies.' Bader (n 21) 4.

²⁹ Nigeria adopted a presidential system of government modelled after the US's system in 1979 and as a consequence there are identical constitutional provisions in both countries. See generally Ben Nwabueze, *The Presidential Constitution of Nigeria* (Hurst & Company 1982).

³⁰ 299 US 304 (1936).

³¹ *ibid* 316 – 317 (per Justice Sutherland). For more insight into the role played by the Britain in the development of central exclusivity in the US's federal system see Bradford R Clark, 'The Federal Common Law of Nations' (2009) 109 (1) *Clr Vol* 28.

Republic, because a united stance had played an important role in winning independence from Great Britain.³²

Although the origin of central exclusivity dates back to colonial periods in America, and the subsequent introduction of the 1787 American Constitution, its entrenchment and justification within the American federal jurisprudence only started gaining ground in the 1800's. A broad federal exclusivity over foreign affairs was found in cases such as *Holmes v Jenninson*,³³ *Knox v Lee*,³⁴ and *Chae Chan Ping v United States*.³⁵ For example in *Chae Chan Ping*, the courts drew a distinction in the relationship between the states and the central government in the US on matters of external and internal competence respectively.³⁶ According to the court, 'For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.'³⁷

The entrenchment of central exclusivity in American federal jurisprudence continued into the 1900s, with the 1920 case of *Missouri v Holland* which entrenched the proposition that the treaty making powers of the US was the exclusive preserve of the federal government.³⁸ Another significant landmark case was the 1936 case of *United States v Curtiss – Wright Export Corps*³⁹ where central exclusivity was justified on the basis that it was an external power accruing to the federal government rather than from the American Constitution.⁴⁰ This position was

³² Schütze (n 20) 108; Jack L Goldsmith, 'Federal Courts, Foreign Affairs and Federalism' (1997)83 (8) Va L Rev 1617, 1644.

³³ 39 US 570 (1840).

³⁴ 79 US 457 (1870) 555.

³⁵ 130 US 581 (1889).

³⁶ See generally Curtis A Bradley, 'The Treaty Making Power and American Federalism' (1999) 97 Mich L Rev 390, 391. Bradley emphasises that the evolution of the American federalism jurisprudence is hinged on a sharp distinction between internal and external competences as the yardstick for the allocation of powers on foreign relations.

³⁷ *ibid* 606.

³⁸ 252 US 416 (1920). The central question in this case was whether the central government could conclude treaties on a subject matter of which they had no internal powers. See Schütze (n 32) 110.

³⁹ 299 US 304 (1936).

⁴⁰ Per Justice Sutherland. See also Schütze (n 38) 111.

emphasised in *United States v Belmont*⁴¹ where it was held that: ‘...government power over external affairs is not distributed, [between the national government and several states] but is vested exclusively in the national government.’⁴² After this, the entrenchment of central exclusivity persisted in subsequent opinions of the courts all the way through the mid-1900s.

In *Zschernig v Miller*,⁴³ the Supreme Court for the first time struck down a state’s legislation which had foreign affairs implications by relying on the dormant foreign affairs doctrine. This case was based on a challenge to a legislation in the State of Oregon which deprived an East German national of his right to inheritance on the basis that nationals of countries which did not have a reciprocal right for US citizens to take property on the same terms as the citizens of that nation were denied such rights under the Oregon law. This was an area where there was no existing federal law expressly catering for the issue covered by the Oregon legislation. However, the court held that ‘...any state law which had a direct impact on foreign affairs and may as well adversely affect the power of the central government to deal with those problems...’⁴⁴ and therefore was an encroachment on the dormant powers of the central government to act on matters of foreign relations.⁴⁵ This approach was not subsequently reaffirmed in the cases which followed over the next 30 years, but it was the clearest signal up to that point and afterwards of the status of foreign affairs as the exclusive preserve of the central government in the US.⁴⁶

The recent crop of foreign affairs federalism cases in the US since the early 1990s have not adhered to the broad dormant foreign affairs type interpretation of central exclusivity as elucidated in *Zshernig v Miller*. Instead, a ‘dominant federal interest’ approach has persisted; with the central government regarded as the dominant player

⁴¹ 301 US 324 (1937).

⁴² *ibid* 330.

⁴³ 389 US 429 (1968).

⁴⁴ *ibid* 440-441.

⁴⁵ Schaefer (2011) (n 18) 204.

⁴⁶ Schütze (n 40)119.

in foreign affairs.⁴⁷ According to Schütze, subsequent cases after *Zschernig* such as *Crosby v National Foreign Trade Council*,⁴⁸ and *American Insurance Association v Garamendi*⁴⁹ ‘have cast doubt over the constitutional exclusivity thesis...’ and have turned to a ‘legislative pre-emption paradigm.’⁵⁰

The preceding cases represent just a cross section of the vast federalism jurisprudence which has emanated from the development of central exclusivity in foreign affairs federalism. This section of the chapter has sought to establish that central exclusivity is deeply rooted in the historical development process of the American Union. The origin and historical development of central exclusivity in the American federalism indicates that it was a constitutional viewpoint which was practical and sensible in light of the circumstances with which the Union was faced as it evolved. This aligns with the arguments in chapter one and two where it was maintained that the evolution of the federal process has played a significant role in shaping the theoretical underpinning of international interactions in specific dispensations of international relations.⁵¹

5.3.2 The Scope and Implications of Central Exclusivity.

From the foregoing, the implication of these developments in foreign affairs federalism spanning over three centuries in the US is that there has been a presumption in favour of central exclusivity on matters of international relations. The corollary of central exclusivity is that there are no concurrent powers for SFGs in relation to the enumerated areas in the Constitution. Central exclusivity is founded on the theoretical presumption that the central government alone should enjoy the capacity to conduct foreign relations because SFGs participating in international relations has the potential to complicate the foreign relations of a federal setup. For example in international trade, the need for certainty and uniformity over the terms

⁴⁷ *ibid.*

⁴⁸ *Crosby v National Foreign Trade Council* 530 US 363 (2000).

⁴⁹ 539 US 396 (2003).

⁵⁰ Schütze (n 47) 119.

⁵¹ See chapter one, section 1.1 and chapter two, section 2.2.1.

of trade between trading nations is a significant factor which has informed the centralisation of international trade policy within one tier of government.

In line with the potential complications which could arise from the involvement of SFGs in international relations, the Constitutions of most federal countries expressly state that the central government is responsible for matters of international interaction including foreign economic policy. In the US, the federal (central) government is constitutionally authorised to conduct foreign affairs. This is by virtue of art I, s 8 and art II of the American Constitution which authorises the federal political branches to conduct foreign relations through the enactment of federal statutes, treaties and executive agreements.⁵²

From the historical development of the foreign affairs doctrine as it was identified in the *Zschenig* case, it shows that the express exclusion of SFGs from enumerated areas under the Constitution is not the only way in which central exclusivity has operated in relation to foreign affairs. There are circumstances when there is no express provision under the constitution which stipulates if a subject matter which has foreign affairs implications comes under federal jurisdiction to the exclusion of SFGs. This is regarded as a grey area in federal/state relations on matters of international relations and is becoming increasingly prominent due to the evolving international relations system.⁵³ Thus, for central exclusivity to be achieved in the foreign relations domain, multiple methods of exclusion have been adopted over the years to cater for both the express and grey areas.

One method of exclusion which has persisted in the historical development of the American federal system is the pre-emption doctrine which operates pursuant to the Supremacy Clause in the US Constitution.⁵⁴ Another method of exclusion is in the form of the dormant foreign affairs doctrine which in the US is encapsulated under the Foreign Commerce Clause; found under art 1, s 8, Clause 3 of the US Constitution. As pointed out in the last section, the continued viability of this

⁵² Goldsmith (n 32)1619.

⁵³ Daniel Abebe and Aziz Huq, 'Foreign Affairs Federalism: A Revisionist Approach' (2013) 66 (3) *Vand L Rev* 723, 726.

⁵⁴ US Const art VI Cl 2. See also Schütze (n 50) 95; Schaefer (2001) (n 45) 204.

doctrine is questionable because it has not been given validation in the recent crop of foreign affairs federalism cases in the US.⁵⁵

However, the pre-emption doctrine still remains the most entrenched and adaptive tool of central exclusivity which has persisted even in light of the changing dynamics of international relations.⁵⁶ In *Hines v Davidowitz*⁵⁷, which centred on the validity of an Alien Registration legislation introduced by Pennsylvania during World War II, the Supreme Court outlined the parameters for the application of the pre-emption doctrine thus:

...where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulation.⁵⁸

The implication of this ruling is that laws made by states in the US which conflict with any subject matter on which the central government has already legislated, based either on the expressly enumerated powers in the Constitution or on any matter not listed but having a relationship with such enumerated powers, will be regarded as inconsistent. In relation to the scope and yardstick for ascertaining when a state law should be pre-empted, the Court stated that it takes into consideration expressions such as ‘conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment, and interference..’, ‘...but

⁵⁵ Schütze (n 54) 119.

⁵⁶ This pre-emption doctrine has been re-affirmed in *Crosby v National Foreign Trade Council* 530 US 363 (2000) and *American Insurance Association v Garamendi* 539 US 396 (2003). These two cases show the entrenchment of the pre-emption doctrine as the main focus of central exclusivity in the US in the 21st century.

⁵⁷ *Hines v Davidowitz* 312 US 52 (1941).

⁵⁸ *ibid* para 66-67.

[that] none of these expressions provides an infallible constitutional test, or an exclusive constitutional yardstick.’⁵⁹

This broad interpretation of the scope of pre-emption may have been easy to reconcile as at 1941 because treaties were the central instruments of international relations which the central government had to worry about. The court was content that ‘whatever power a state may have is subordinate to supreme national law.’⁶⁰ But in light of the multiplicity of instruments with legal implications which have emerged on the international plane and the diverse actors now engaged or seeking to engage in international relations, it is doubtful if the court anticipated the full ramifications of the decision. Either they were advocating a formula so wide that there is no room for state activity in international relations or they only expected this formula to apply only to international agreements properly so called (as recognised under the Vienna Convention on Treaties). Whatever the case, the pre-emption doctrine under the current dispensation of international relations means that the central government will constantly be at logger heads with SFGs. This is because international relations now transcends so many interconnected issues that the wide range of phrases listed by the court will always find state legislative activity to be in conflict with the central government.

From the above analyses of the origin, historical evolution and scope of central exclusivity in foreign affairs federalism, the following characteristics can be deduced. First, central exclusivity in the area of foreign affairs has been a potent force in the development of the American federalism. Second, foreign affairs has been classified as an exceptional category in the central/state relationship which was presumed to be better handled by the central government because of the potential pitfalls of allowing states to SFGs concurrent jurisdiction. Third, exclusivity for a central government on matters of foreign interactions arises in two situations namely: areas of express enumerated powers in favour of the central government and the grey areas when there are no expressly enumerated powers but the activities of SFGs in these areas still has a potential to conflict with the presumption in favour of the central government’s jurisdiction. Fourth, the pre-emption and dormant foreign

⁵⁹ *ibid* 67.

⁶⁰ *ibid* 68.

affairs doctrines are the instruments by which central exclusivity has operated in American foreign affairs federalism; and the pre-emption doctrine has eclipsed the dormant foreign affairs doctrine as the embodiment of central exclusivity in foreign affairs federalism in the US. Lastly, applicable parallels can be drawn between the US and Nigeria in the process of central exclusivity in foreign affairs, because Nigeria's political system and approach to foreign relations is modelled after the US.

In the next section, the merits and demerits of central exclusivity in international relations will be considered so as to present an objective assessment of the viability of this theoretical position. In this section, the main emphasis will now be on international trade relations as an aspect of foreign economic affairs.

5.3.3 Appraising the Advantages and Disadvantages of Central Exclusivity in International Trade Relations.

In this section, the advantages and disadvantages of central exclusivity will be considered. First the advantages will be discussed, and then the corresponding diasadvantage (if any) will follow.

Advantages

1. Certainty and Uniformity in International Trade Relations

One important consideration which makes central exclusivity desirable in international trade relations is because of the need for certainty and uniformity in trade terms.⁶¹ Over a century ago, Justice Taney in *Holmes v. Jennison*⁶² expressed this view about foreign relations in general stating that 'To allow the states concurrent powers in the area of international relations would not be well calculated to preserve respect abroad or union at home...'⁶³ He believed that the ability of a nation to speak with one voice was crucial to stability. Within the context of

⁶¹ Schütze (n 55) 108. In the Nigerian context, Nwabueze in his analysis of the 1979 Constitution of Nigeria (which is similar to the 1999 Constitution) argues that the separation of powers on matters of external affairs within the Nigerian federalism was premised on the need for leadership and direction by the central government so as to effectively regulate the impact of state action on the national economy and society. Nwabueze (n 29) 42ff, 53-63.

⁶² *Holmes v. Jennison* 39 US 570 (1840).

⁶³ *ibid* 577.

international trade, the need for certainty of trade terms is a major advantage of central exclusivity in international trade relations. Central exclusivity was particularly instrumental to the ascent and entrenchment of the neo - liberal tenets of the multilateral trade order. This is because the removal of barriers to free trade (tariff and non-tariff alike) would have been hindered if trading nations had overlapping levels of regulation which could result in the side-stepping of agreements reached between trading partners. Conflict could arise if there is no central voice which harmonises the policy stance of each trading nation. For example, an SFG involved in international trade relations could for selfish political reasons adopt subversive trade rules which are in conflict with those of the rest of the country; thereby incurring retaliatory measures against the whole country. In essence, the actions of one or more SFGs could adversely affect the rest of the country.⁶⁴

Also, the involvement of SFGs could result in protracted trade negotiations and stalemates if there are conflicts arising due to different viewpoints at different levels of regulation. This situation is evident in Canada which has a liberal federal structure that accommodates the input of SFGs in its foreign policy regime. During the implementation of the Kyoto Protocol, there was tension in the central government/provincial relationships. This was due to a challenge by Alberta of Ottawa's authority to enter into international commitments that affected subject matters under the constitutional jurisdiction of the provinces.⁶⁵ Although Alberta's challenge was a legitimate exercise of their mandate under the Canadian Constitution, the motives were deemed to be politically calculated to flex its muscles with the central government under the guise of legitimate concern about the Kyoto protocol.⁶⁶

⁶⁴ Schaefer (2011) (n 45) 213-215.

⁶⁵ Christopher J Kukucha, 'From Kyoto to the WTO: Evaluating the Constitutional Legitimacy of the Provinces in Canadian Foreign Trade and Environmental Policy' (2005) 38 (1) Can J Pol Sci 129, 147.

⁶⁶ *ibid.*

Spiro⁶⁷ in his analysis of the role of US states in immigration regulatory patterns is candid enough to admit that one of the merits of the dominance of central governments in international relations for the better part of this century is reduced state involvement in foreign policy which could lead to conflict.⁶⁸ Spiro asserts that ‘...as [is] true with the rest of foreign policy, there *were* (emphasis added) significant structural advantages in allocating immigration policy to a centralised agent capable of processing immigration decisions as part of the general mix of foreign relations considerations.’⁶⁹ He identifies that there was a tendency for SFGs to act on preferences that could upset the sensitive balance of bilateral relations, with possibly catastrophic consequences.⁷⁰ In summary, centralised foreign policy action has the distinct advantage of presenting a common front, commanding respect abroad and encouraging uniformity of trade terms.

2. Centralisation Caters for the Diversity of Views and Prevents Arbitrary Abuse by the Central Government via Built-In Constitutional Safeguards

Another merit of central exclusivity is the presence of constitutional safeguards in the provisions which allocate treaty making powers to the central government. These safeguards are presumably inserted to ensure contribution from the SFGs while limiting the excesses of the central government at the same time.⁷¹ For example in the US, this safeguard is found in the legislative procedure relating to the treaty making powers of the President. Before a treaty is ratified between the US and a foreign country, the President must obtain the consent of two-thirds of the Senate.⁷²

⁶⁷ Peter J Spiro, ‘Federalism and Immigration: Models and Trends’ (2001) 53 (167) Intl Soc Sci J 67, 71.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ *ibid.* It must be noted that the context in which Spiro talks about the merit of central exclusivity is with a reservation that it is not certain that state’s involvement in foreign policy will always lead to these adverse consequences. The emphasis on ‘were’ also shows that he was also talking about this disadvantage of state involvement in foreign policy under the circumstances of a dispensation in international relations which is no longer the same.

⁷¹ See chapter four, section 4.7.1 and chapter six, section 6.2.3 (*infra*) for discussions on constitutional safe-guards in Nigeria. See also Schütze (n 61)112.

⁷² US Const art VI Cl 2. See also <<http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm>> accessed 08 July 2013.

In Nigeria, a similar provision is found in s 12 of the 1999 Constitution⁷³ which was discussed in chapter four. It was pointed out that there is no record of this section being utilised in Nigeria and that this moribund section is indicative of a political culture of ‘limited participation’ in Nigeria’s international trade regime.⁷⁴

3. Central Exclusivity is Important for Achieving Optimal Regulation in a Complex International Trade System

Another appeal of central exclusivity in international trade relations is that it is perceived to be important for optimal regulation in light of the evolving complexities in international economic interactions. This advantage is premised on the belief that a complex international trade regime, which has different types of trade agreements and commitments involving multiple parties with expansive implementation requirements, necessitates a harmonisation approach so as to effectively manage the system.⁷⁵ For example in the EU, the Commission is responsible for the negotiation agenda of all the member states in regard to issues where the EU has competence.⁷⁶ The Commission seeks the authorisation of the member states before it commences the negotiation process but is thereafter responsible for ironing out the complicated details of the agreements.⁷⁷ Considering the variations in the agreements being negotiated with different countries and regions all over the world, the role of the Commission as the representative of the member states is crucial for ensuring optimal outcomes for the EU as a whole.⁷⁸ If each member state is allowed to put forward its own terms and conditions during negotiations, the process could be

⁷³ C23 LFN 2004.

⁷⁴ See chapter four, section 4.7.

⁷⁵ Richard Baldwin, ‘Lessons from the European Spaghetti Bowl’ (Conference on Multilateralising Asian Regionalism, Tokyo, September 2008) <http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Baldwin/Publications/Chapters/Regionalism/Baldwin%20European%20Spaghetti%20Lessons_1Sep08_%20rb.pdf> accessed 14 April 2014. See generally, Antoni Estevadeordal and others, ‘Harmonizing Rules of Origin Regimes around the World’ (Conference on Multilateralising Regionalism, Geneva, September 2007) <http://www.wto.org/english/tratop_e/region_e/con_sep07_e/estevadeordal_harris_suominen_e.pdf> accessed 14 April 2014.

⁷⁶ Schütze (n 81) 290.

⁷⁷ See generally, ‘The EU’s Bilateral Trade and Investment Agreements – where are we?’ <http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150129.pdf> accessed 14 April 2014.

⁷⁸ Baldwin (n 89) 11.

cumbersome. There is also an advantage which comes from the resources being pooled together during negotiation under the auspices of the EU because not all member states have the financial capacity to negotiate on their own. Moreover, the member states have a common objective which informs the competence of the Commission when negotiating so it is easier to reconcile the considerations of each member state under the Commission's negotiation mandate. Thus, attaining optimal policy outcomes in an era of globalised economic interactions is enhanced when there is harmonisation of the negotiation process.

4. A Common Front in Foreign Affairs as an Effective Tool for Adopting and/or Preventing Trade Retaliation in International Trade Relations

Another merit of central exclusivity in foreign economic relations, and especially in international trade is that it is effective for adopting and/or curbing trade retaliation measures against other trading partners. Trade retaliations refer to measures adopted by a trading nation in response to foreign measures that nullify or impair their rights under international trade law.⁷⁹ Schaefer argues that one of the major reasons why states are not allowed to engage in foreign affairs is because the founders of the nation (the US) had this concern that retaliation against a state action in foreign affairs would affect the nation as a whole.⁸⁰

The EU,⁸¹ US⁸² and Japan⁸³ have utilised trade retaliation measures which are in accordance with WTO rules, as a major tool for forcing compliance from their trading partners.⁸⁴ Without a centralised policy mechanism, it would be difficult to achieve this objective. For example, the ability of the EU's Technical Barrier

⁷⁹ Mitsuo Matsushita and others, *The World Trade Organisation: Law, Practice, and Policy* (2nd edn, OUP 2006) 133.

⁸⁰ Schaefer (2001) (n 55) 38.

⁸¹ EC Council Regulation on Obstacles to Trade No 3286/94 of 22 December 1994.

⁸² See s 301 of the Trade Act of 1974, 19 USCA 2420 and its variants (the Super 301: 19 USCA 2242(a)) and (the Special 301: 19 USCA 3111). See Matsushita and others (n 97) 133.

⁸³ See generally art 6 and 7 Kanzei Teiritsu Ho [Customs and tariff law], Law No 54 of 1910 as amended; Gaikokukawase Oyobi Gaikoku Boeki Ho, Law 228, 1949 as amended.

⁸⁴ After the Uruguay Rounds of Multilateral negotiations, The EU introduced the Trade Barrier Instrument (TBI) which is designed to safeguard the EU's rights under international trade law. See EC Council Regulation 3286/94 (n 99). See also Matsushita and others (n 100) 133.

Instrument (TBI) to curb any “illicit commercial practice” by a third party which is harmful to the common commercial policy of the EU will not be effective if each member state is allowed to dictate its own foreign trade relations. The EU has demonstrated the potency of a common front by implementing a measure in March, 2013, which prohibited the importation of timber products from countries like Nigeria which have not signed an Economic Partnership Agreement (EPA) with the EU. Timber products from Nigeria are now considered ‘illegally sourced products.’⁸⁵ If the member states in the EU have the power to opt out of this common front, then the potency of this action against countries at which the measure is targeted will be weakened.⁸⁶

Disadvantages

1. Central exclusivity does not give room for variation in the conceptualisation of international trade relations

An argument against adhering to uniformity and certainty as a basis for the conduct of international economic relations is that central exclusivity does not give ample opportunity for variation in the conceptualisation of foreign relations. The issues which relate to international relations are broad and varied and as such it is becoming increasingly difficult to properly delineate the limits of what could affect international trade. For example, in the early years of the multilateral process the emphasis was on tariff reductions. However, it soon became clear that the biggest obstacles to entrenching multilateral liberal tenets were Non – Tariff Barriers (NTBs).⁸⁷

⁸⁵ See vanguard newspaper report titled: ‘EU to shut out Nigeria from its Timber Market in 2013 - Official’ *Vanguard Newspaper* (Lagos, 18 December 2012) <<http://www.vanguardngr.com/2012/12/eu-to-shut-out-nigeria-from-its-timber-market-in-2013-official/#sthash.Bji8p9cH.dpuf>> accessed 30 June 2013.

⁸⁶ See generally Cosmas O Ochieng, ‘The EU – ACP Economic Partnership Agreements and the “Development Question”: Constraints and Opportunities Posed by Article XXIV and Special and Differential Treatment Provisions of the WTO’ (2007) 10 (2) JIEL 363.

⁸⁷ NTBs (NTBs are also referred to as Non – Tariff Measures under the WTO rules) cover a broad range of policies which have the potential to impact negatively on the MFN or NT clauses in the GATT Agreements. See generally <http://www.wto.org/english/thewto_e/glossary_e/ntbs_e.htm> for what constitutes NTBs under WTO rules for non-discrimination. See also Edward J Ray, ‘Changing Patterns of Protectionism: The Fall in Tariffs and the Rise in Non-Tariff Barriers Symposium: The

In view of the broadening scope of international trade relations, the challenge with central exclusivity as the accepted norm is that it presents a truncated view of the evolving international economic process. For example, because the conceptualisation of foreign relations is still rooted in nation-state practice, international economic arrangements between SFGs and international actors are denied recognition under international law.⁸⁸ However, this mechanism which helps to protect the continuation of nation-state practice in international relations creates a limited conceptualisation of international relations. This is because in reality, economic arrangements which are trans-boundary in nature have a bearing on international relations irrespective of the perceived illegitimacy of the actors involved or the form utilised. In a bid to deny the legitimacy of arrangements which do not conform to the norm, central exclusivity denies the power of these arrangements and their ability to either negatively or positively affect the course of international economic relations.

In realisation of the potential of SFGs to negatively or positively affect the international economic process it is not surprising that Russia and China, who traditionally operated highly centralised political systems, have allowed their SFGs a degree of latitude on foreign economic policy. A look at post cold-war Russia shows that the Kremlin out of necessity rather than democracy have given economic and political autonomy to regions of the Russian federation such as Tatarstan, Bashkortostan and Chuvashia.⁸⁹ It is argued that such moves by the Kremlin were informed by a realisation that the activities of its regions had far reaching consequences for both the economic and political stability of Russia.⁹⁰

In the case of China, a country which has predominantly been unitary in its style of governance, its exponential economic growth in the past 20 years is partly

Political Economy of International Trade Law and Policy' (1987) *Nw J Intl L & Bus* 286; John Quinn, 'Federalism and Foreign Economic Relations' (1985) 10 *Can-US LJ* 197, 197-200.

⁸⁸ See chapter two, section 2.4. See also Ivan Bernier, *International Legal Aspects of Federalism* (Longman 1973) 1; art 27 Vienna Convention on the Law of Treaties 1969, UN Doc A/CONF 39/27.

⁸⁹ See Noé Cornago, 'Diplomacy and Paradiplomacy in the Redefinition of International Security: Dimensions of Conflict and Co-operation' in Francisco Aldecoa and Michael Keating (eds), *Paradiplomacy in Action: The Foreign Relations of Sub-National Governments* (Routledge 2013) 45 – 46. Cornago argues that the Kremlin resorted to paradiplomacy as a means of managing ethnic conflicts within the Russian federation.

⁹⁰ Cornago (n 73) 45.

attributable to the fact that she revolutionised her political and economic institutions; to effectively capture a broad conceptualisation of the comparative advantage to be gained from recognising the role of the provinces in foreign trade. According to Zheng⁹¹ ‘...in post- Mao China, the central party-state is no longer monolithic in all aspects of China's foreign affairs. Instead, provincial governments have become increasingly paradiplomatic actors in China's foreign trade.’⁹²

From the foregoing examples, the reality is that international economic interactions are now characterised by new actors and complicated factors, hence the growth of alternative governance theories seeking to make sense of the complexities in a new dispensation of global integration. For example, Gavin’s⁹³ study on multi – level governance focuses on the manifestation of the evolving interaction between old and new emerging actors in the international economic policy sphere.⁹⁴ He defines multilevel regulatory governance as ‘Regulatory strategies and activities covering the development, execution and reform of regulation between national, supranational and sub-national levels.’⁹⁵ He argues that the expansion in the international economic policy sphere has necessitated the involvement of new actors such as SFGs; which requires coherence between the multiple layers of international economic regulation.⁹⁶

⁹¹ Yong-Nian Zheng, ‘Perforated Sovereignty: Provincial Dynamism and China's Foreign Trade’ (2007) 7(3) Pacific Rev 309.

⁹² *ibid* 310.

⁹³ Brigid Gavin, ‘Reconciling Regionalism and Multilateralism: Towards Multilevel Trade Governance’ in Philippe De Lombaerde (ed), *Multilateralism, Regionalism and Bilateralism in Trade and Investment: 2006 World Report on Regional Integration* (Springer 2006) 59-72.

⁹⁴ *ibid*.

⁹⁵ *ibid* 60.

⁹⁶ *ibid* 69. This assessment aligns with the working criteria adopted in chapter four on the attributes of an ideal trade regime in this dispensation. See generally, chapter four, section 4.6 – 4.7.

2. Broad pre-emption powers enjoyed by central governments encroach into the domestic space of SFGs because of the expanding scope of international economic relations

As was pointed out earlier, central exclusivity is based on a presumption that foreign relations are best managed by the central level of government. But in a dispensation of foreign relations which is characterised by interwoven issue areas, for a central government to fully exert its influence abroad, a plethora of interconnected issues including finance, taxation, trade, health, environment, national security etc. which have a bearing on the foreign relations objectives of the country have to be taken into consideration. These issues which affect foreign relations are constantly expanding and encroaching into new areas which fall within the jurisdiction of SFGs. While in theory a dualised track is maintained in relation to foreign affairs, in reality, the constitutional parameters of the central/state relations are constantly being expanded in favour of the central government so as to accommodate the expanding scope of foreign relations.⁹⁷ The danger with such a broad interpretation of the mandate given to a central government in relation to foreign interactions is that it erodes the distinctive areas of competence between the central and state governments. With the central government having the upper hand due to pre-emptive powers, they can rely on this expansive scope of foreign relations as a pretext to justify unnecessary encroachment into the constitutional space of SFGs. The expanding scope of international economic relations also makes it difficult to differentiate between subject matters which are constitutionally within the jurisdiction of SFGs and those which are the prerogative of the central government. In a bid to stay on top of all things pertaining to foreign relations, the central government can abuse the 'occupying the field' doctrine by constantly pre-empting SFGs if they take any action which has a link to international relations.

For example in India, agriculture is under the jurisdiction of the regions.⁹⁸ During the multilateral negotiations at Doha which led to the introduction of the WTO in 1994, the regions raised concerns because the central government did not consult with them before signing up to multilateral commitments on agriculture which had significant

⁹⁷ Goldsmith (n 52) 1644.

⁹⁸ See Item 14 under the State List, Schedule 7 of the Indian Constitution.

implementation impacts on the agricultural sector in India.⁹⁹ When the regions challenged the legitimacy of the central government's usurpation of the regions' jurisdiction on agriculture and the cavalier attitude in which their concerns were handled, the central government ignored them.¹⁰⁰ This is not surprising considering the constitutional powers of the central government to sign treaties and the importance of the multilateral process at that point in time. These powers provide justification for central governments to cover the field in relation to any area having implications on foreign affairs. This is not healthy for a federal system because it creates political tension as was the case in India or leads to total disinterest by SFGs in anything which has to do with foreign relations. Either of these outcomes is dangerous because implementation of any international agreement eventually relies on grassroots compliance by SFGs. If SFGs feel politically outmuscled in the negotiation process or lose interest in anything pertaining to trade agreements, they could frustrate the implementation of such an agreement signed by the central government. Political tension could lead to rebellious counter action by SFGs and disinterest could lead to lax compliance.

3. Central exclusivity does not take cognisance of federalism as an evolving process

It is difficult to reconcile central exclusivity in federal systems in light of the constantly evolving nature of the federal process discussed in chapter two.¹⁰¹

The significance of the federal process is that it is ideally meant to encourage joint participation and shared responsibility for the issues common to the parties to the federal arrangement. These issues are never static and as a consequence, the political and constitutional response must also evolve accordingly. More so, the exigencies of the evolving international trade system necessitate an adjustment in the configuration of federal setups; to effectively reflect the realities of the changing dynamics of the international economic system and the welfare expectations of the constituent units

⁹⁹ K Sridharan, 'Federalism and Foreign Relations: The Nascent Role of the Indian States' (2003) 27 (4) Asian Stud Rev 463, 478 – 484.

¹⁰⁰ *ibid.*

¹⁰¹ See chapter two, section 2.2.1-2.2.2.

of the federal setup. This assertion is evidenced by the expansion of the regulatory competence of the multilateral system of the WTO and Regional Trade Agreements (RTAs) which has led to an incursion of international economic norms into the domestic policy sphere of countries in the international system.¹⁰² This expansion in the international economic regulatory competence to include issues such as consumer protection, environment, services etc., has led to a proliferation of new actors (state and non – state actors alike) who are now more directly affected by the process of international economic participation and regulation. Putting the extent of this external incursion by international economic regimes into context, it simply means that a federal setup is more prone to changes due to exogenous influences than a non – federal setup.¹⁰³ Central exclusivity does not adequately capture this dynamic nature of the federal process by insisting on an exemption for foreign relations from federalism tenets. This is a disadvantage because the influence of changes in the international system on the opportunities for SFGs to participate in international economic arrangements is increasingly harder to ignore.

4. Central exclusivity does not encourage the maximisation of potential in a federal system

The current dispensation in the international economic system is laden with opportunities for nations to expand their participation and effectively utilise international trade and commerce as tools for economic development. Central exclusivity does not encourage the maximisation of potential under this new dispensation of international trade relations. This is because the constitutional categorisation given to foreign relations does not encourage SFGs to participate in the trade process. This disadvantage is particularly evident in a country like Nigeria where the general perception is that foreign trade interactions involve the federal agencies and the primary exporters/importers but not SFGs. Therefore, SFGs in Nigeria do not see any reason why they should bother themselves about an area which is the exclusive preserve of the central government. The central government does not help the situation because they are quick to emphasise to SFGs that their (the SFGs) contribution to Nigeria's international trade mechanism is merely

¹⁰² Christopher J Kukucha, *The Provinces and Canadian Foreign Trade Policy* (UBC Press 2008) 3.

¹⁰³ See chapter two, section 2.2.2.

advisory. The constant refrain from the centre to SFGs is that they should steer clear of the regulation of international trade because it is not their constitutional role. The consequence of this perception is that most SFGs in Nigeria are either oblivious to the potential and capacity they have in the current dispensation of international economic relations where opportunities are rife or they are discouraged from acting on them.

Moreover the central government has over the years shown its inability to actualise a diversification of the Nigerian economy because in reality its foreign policy objectives are tied to crude oil production which is the most attractive resource to the central government.¹⁰⁴ The central government's handling of the Nigerian oil industry and the neglect of other lucrative resources in the country is evidence that central exclusivity is a policy stance which is not helping to maximise foreign trade potential in Nigeria.

5. Targeted retaliation is now possible under the new dispensation of international trade relations

It has been argued that the fears about retaliation which arise from the transgressions of one or more SFG are no longer an issue because in the area of international trade interaction, targeted retaliation is now a reality. In a globalised world, a foreign nation can target retaliation against any specific sub-national entity (e.g. US state government). Spiro is of the view that globalisation has changed the dynamics of international relations to the extent that 'There is now better information, increased communication and increased awareness of the US's political system which makes foreign states less likely to misascribe the actions of one state to the nation as a whole.' He argues that 'The world is no longer so neatly divided into sovereign boxes locked in a zero-sum conflict that was buffered by few institutional restraints.' Spiro further identifies that this evolution in the dynamics of international relations is also evident in the international trade system as characterised by the fluctuating

¹⁰⁴ This is due in part to the fact that the FG derives a royalty payment from oil production by the multinational corporations which operate under Joint Venture Agreements with the FG, as well as negotiating power with other states. See Cyril Obi, 'Oil, Environmental Conflict and National Security in Nigeria: Ramifications of the Ecology-Security Nexus for Sub-Regional Peace' (1997) Arms Control and Disarmament and International Security Program (ACDIS) Occasional Paper 5-7. <<https://www.ideals.illinois.edu/bitstream/handle/2142/18/ObiOP.pdf?sequence=>> accessed 13 May 2014.

relationship between multilateralism and regionalism, the globalisation effect on the conduct of international trade; and more importantly the redefinition of the actors now regarded as the subjects of international trade interaction.

In the US context, the circumstances of the Cold War which made it imperative for central governments to control the delicate relationships fostered by bloc alliances and the high stakes of Cold War relations is no longer an issue. Spiro further argues that not only have the stakes diminished, but the very nature of the international society may have changed in such a way as to more completely undermine the foreign affairs differential. He argues that the nation has been disaggregated, so that the channels of contact across national boundaries are now myriad where they used to be singular. He links these changes in the external dynamics with the internal configuration of federal setups by asserting that with the change in the nature of trans-boundary contacts comes an understanding of the internal allocation of authority in other nations. In his view, with this new dynamic, other nations will be less likely to misascribe the position of one institution to that of another or of the nation as a whole.

5.3.4 Summary: Rebutting the Status Quo

Foreign affairs have remained immune from the dictates of federalism for a significant part of the last century. This immunity covers the broad spectrum of matters which include international trade relations. Central exclusivity in international trade relations has reigned supreme in most federal setups all over the world. In Nigeria, the position is not different. From a perusal of the constitutional provisions, the structure of the international trade policy mechanism and the interviews conducted with policy makers at both state and central level, it is established that the central government in Nigeria has plenary powers for the conduct of international trade. Based on the advantages and disadvantages identified in the previous section, it is argued that central exclusivity in international trade relations is no longer tenable as the applicable constitutional stance for Nigeria in this new dispensation of international trade relations. From the foregoing analyses, it is clear that the immunity which foreign relations have been ascribed excluding it from the

dictates of the federal process is no longer realistic. Spiro supports this view stating that:

...the disaggregation of the state and economic globalisation all suggest foundational shifts in the structure of the global system. To the extent constitutional doctrines have been grounded in the old framework, they must be re-examined against the new. Frameworks conceived in other times may emerge inappropriate in the changed global context.¹⁰⁵

In the pre-globalisation era it was acceptable to distinguish between issues which were external or internal to the constitutional process of a federal setup. However, with the consistent incursion of international trade issues from the multilateral and regional systems into the domestic space of trading nations – especially federal setups - the distinction between what is external and internal is now a mirage. As Spiro points out above, the globalisation of the world economic system has given rise to a rethink of the methods by which effective international trade relations is achieved.¹⁰⁶

The popular logic that harmonisation of regulation is the most effective method of bringing all the overlapping and interconnected aspects of an evolving international trade system into a coherent flow is now questionable. It is increasingly clear that the new dispensation of international trade relations demands more. For example, the EU has recognised the need for differentiation in its harmonisation technique by encouraging experimentation in policy formulation at local levels under the guidance of the subsidiarity principle.¹⁰⁷ This has led to a growing body of literature on multilevel global governance. The study of multilevel governance structures recognises that the impact of globalisation on international relations in general has resulted in a need for coordinated regulation at different levels of interaction.¹⁰⁸

¹⁰⁵ Peter J Spiro, 'Globalisation and the (Foreign Affairs) Constitution' (2002) 63 Ohio St LJ 649, 668 – 669.

¹⁰⁶ *ibid.* See also Hayes (n 10) 9.

¹⁰⁷ Schütze (n 90) 347.

¹⁰⁸ Gavin (n 80).

These levels are international, regional, national and sub-national.¹⁰⁹ All four levels of governance are interconnected and an attempt to isolate any of the levels is no longer tenable because it could have a negative ripple impact which will affect all the other levels. This does not dispense with the need for uniformity; but to achieve uniformity and certainty, diversity must be incorporated. This is a reason why the continued exemption of international trade policy from the mainstream of the federal process is unrealistic. For example, competition policy cuts across all levels of interaction in the multilevel system and can only be effective if there is cooperation on all the four levels of interaction. At the international level, cooperation on competition policy is required because services are now a significant aspect of international trade; which makes it possible for monopolies to be exported from one trading nation to another, thereby distorting competition in the world trade system.¹¹⁰ At a regional level cooperation is also required because countries interacting due to geographic or economic ties can negatively or positively affect any efforts at the international or national level.¹¹¹ At the national level, Item 14 under the State List, Schedule 7 of the Indian Constitution, all stakeholders (state and non – state actors) must cooperate so as to achieve compliance with measures reached at both the regional and international levels. In the US, the role of the states in achieving a coherent competition policy is recognised to the extent that state agencies acting pursuant to a clearly articulated state law are given a qualified exception from federal antitrust scrutiny.¹¹²

In Nigeria, the challenge with the current structure is that in relation to competition policy at the national level, SFGs are frozen out of the equation. Commercial and industrial monopolies, combines and trusts are under the ELL of the Nigerian 1999 Constitution.¹¹³ There is neither a comprehensive legislation on competition policy in place nor linkage between SFGs and the FG in relation to the competition policy

¹⁰⁹ Peter K Kresl, 'Sub-National Governments and Regional Trade Liberalisation in Europe and North America' (1994) 17(2-3) J Eur Integration 309.

¹¹⁰ Laura Ani, 'Rethinking Competition Law and Policy: Building a Framework for Implementation in Nigeria' [2011] NIALS J Bus L 1, 16-17.

¹¹¹ *ibid.*

¹¹² *Parker v. Brown* 317 US 341 (1943).

¹¹³ Cap C23 LFN 2004.

regime of the country. The FG has addressed issues of competition policy in a fragmented fashion. For example, the privatisation process in sectors such as power and oil and gas is carried out by the central government pursuant to its exclusive prerogative under the constitution. This runs contrary to the practice in other jurisdictions and the growing recognition of the expanding implications of competition policy on all levels of international interactions.

Compliance with competition policy continues to remain an unfulfilled dream in Nigeria and it is plausible that it is caused by important stakeholders such as SFGs being excluded from the process. When central (federal) agencies enjoy a monopoly in monitoring competition policy, 'regulatory capture' can occur.¹¹⁴ In the case of Nigeria, regulatory capture is exemplified in the privatisation process of public utilities, where the control of the privatisation process by the Bureau for Public Enterprise (BPE) - the federal agency having the prerogative for privatisation- has raised question marks about the legitimacy and transparency of the process. It is argued that the exclusive prerogative enjoyed by the BPE has effectively created more monopolies in Nigeria. For example, controversies have surrounded the undue advantage which Transcorp PLC enjoyed in the privatisation process in Nigeria during Obasanjo's presidential tenure.¹¹⁵ Transcorp has taken over major public utilities amidst reports of improprieties which exist in its holding structure, incorporation and listing on the Nigerian Stock Exchange.¹¹⁶ According to a report by Ikita, '...Transcorp's shares were listed in the Nigeria Stock Exchange (NSE) even without any certificate of incorporation issued by the Corporate Affairs Commission (CAC), the registrar of companies in Nigeria.'¹¹⁷ The broader

¹¹⁴ Posner defines regulatory capture as '...the subversion of regulatory agencies by the firms they regulate.' See Richard A Posner, 'The Concept of Regulatory Capture: A Short, Inglorious History' in Daniel Carpenter and David Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (CUP 2013) 2.

¹¹⁵ The corporation is regarded as a farcical 'corporation' concocted by former President Olusegun Obasanjo. See generally Philip Ikita, 'The Transcorp Escapade: Finished, Dead on Arrival' *Village Square* (Nigeria, 17 February 2008) <<http://nigeriavillagesquare.com/arts/philip-ikita/the-transcorp-escapade-finished-dead-on-arrival.html>> accessed 29 July 2013. See also J Ayobolu, 'Fawehinmi and Obasanjo's Ownership of Shares in Transcorp' (2006) <<http://www.dawodu.com/ayobolu14.htm>> accessed 29 July 2013.

¹¹⁶ Ikita (n 122).

¹¹⁷ *ibid.*

implication of this kind of practice is that competition policy, which has become an important aspect of international trade relations in this current dispensation, requires competing regulatory actors such as SFGs which can create a redundancy effect in competition regulation. Schapiro in his 'Polyphonic' conceptualisation of federalism describes 'regulatory redundancy' as a situation where there is overlapping regulation from different levels of government which serves as a fail-safe mechanism and encourages innovation because one regulator need not maintain its status quo if other regulators have back-up measures in place.¹¹⁸

Another example which demonstrates the incompatibility of central exclusivity with the current dispensation of international trade relations is found in the financial sector. In the pre – globalisation era, it was possible to justify centralised regulation of international financial interactions because there was a well-defined understanding of the permissible actors which could be involved in international finance arrangements and the type of international financial arrangements recognised by international law. Under this dispensation, it was easier adhering to central exclusivity in foreign relations because the constitutional understanding of the permissible participants in international relations made it difficult for SFGs to interact in the international financial system. This was an era when state practice was the only recognised standard in international relations. However with the advent of globalisation process, there was an evolution of the international financial system characterised by integration of domestic financial systems into an international financial system.¹¹⁹ An obvious consequence of integration has been an increase in external regulatory cooperation among the financial systems of the world.¹²⁰

The emergence of a globalised financial system has also had an inward contraction effect which penetrates the domestic regulatory framework of federal setups. This

¹¹⁸ Robert A Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (University of Chicago University Press 2009) 100-101. See also Bader (n 28) 26. Bader utilises Schapiro's redundancy framework to justify cooperative federalism as a replacement for dualism in federal relations. He advocates that 'Redundancy on the level of implementation, which exists in cooperative schemes between state and local governmental actors, is far more useful because it reduces the occurrence of under enforcement.'

¹¹⁹ See generally, Dilip K Das, 'Globalisation in the World of Finance: An Analytical History' (2006) 6 (1) *Global Econ J* 1, 6.

¹²⁰ *ibid* 14. See also, Oliver Wyman, *The Future of the Global Financial System a Near-Term Outlook and Long-Term Scenarios* (World Economic Forum 2009) 17-19.

effect is evidenced by the fact that SFGs are now permissible actors in international financial arrangements. For example in this dispensation, ‘The World Bank and the International Finance Corporation (IFC, the Bank’s private sector arm) are jointly encouraging sub-national lending to states or provinces, aimed at boosting direct engagement at the state or municipal level.’¹²¹ In India, this has become a prominent issue which is attributed to the economic liberalisation reforms she embarked on in the 1990s.¹²² Sridharan is of the view that economic liberalisation reforms have ‘given the Indian states unforeseen opportunities to sprout an external wing.’¹²³ One way in which the states in India have expressed themselves is by ‘conducting negotiations and concluding agreements with international economic institutions such as the Asian Development Bank...’¹²⁴ Jenkins argues that the importance of these activities of the Indian state should not be exaggerated because the central government has still maintained a level of control over the process.¹²⁵ However, it points to the manifestation of an outcome which came about by a process of economic liberalisation in India. Furthermore, it shows a shift from the old constitutional paradigm of central exclusivity and the emergence of a new process of international financial cooperation. In essence, the process of economic liberalisation coupled with the globalisation effect in international financing lead to an outcome where SFGs became active participants in international financial arrangements. More importantly, this has led to a paradigm shift in the constitutional arrangement in India so as to cater for the outcome.¹²⁶

¹²¹ ‘World Bank Group’s Sub-National Lending’ (*Bretton Woods Project*, 13 February 2013) <<http://www.brettonwoodsproject.org/2013/02/art-572016/>> accessed 10 April 2014. See also J Steffensen and S Trollegaard, *Fiscal Decentralisation and Sub-National Government Finance in Relation to Infrastructure and Service Provision: Synthesis Report on 6 Sub-Saharan African Country Studies* (2000) The International Bank for Reconstruction and Development/The World Bank <<http://www.afrimap.org/english/images/documents/file42c94f42bb6f9.pdf>> accessed 10 April 2014.

¹²² Sridharan (n 88) 468.

¹²³ *ibid.*

¹²⁴ Ron Jenkins, ‘Emerging Federal Process in India’ [2003] *Publius* 63, 71.

¹²⁵ *ibid.* 72.

¹²⁶ Amitbah Mattoo and Happymon Jacob, ‘Foreign Relations in India: A Growing State Role’ in Hans Michelmann (ed), *A Global Dialogue on Federalism: Foreign Relations in Federal Countries*, Vol 5 (McGill-Queen’s University Press 2006) 27.

Based on the inadequacies identified with the existing status quo of central exclusivity, it is now pertinent to consider the viability of cooperative federalism as an alternative viewpoint relating to the constitutional allocation of powers between the central and SFGs on matters of international trade. The aim in the next section is to appraise cooperative federalism as a replacement for central exclusivity in foreign affairs federalism in light of the outcomes which have emerged from a process of evolution in the international trade system.

5.4 Cooperative Federalism in International Relations

Cooperative federalism is a model of federalism which falls under the ‘non – dual’ categorisation of federalism. Cooperative federalism represents a mid-point between the orthodox dualised conceptualisation of federalism and revisionist decentralisation theories; which are the extreme opposite of central exclusivity in the foreign affairs federalism spectrum.

Cooperative federalism entails a process of federal relations where different levels of government in a federal setup work together as complementary parts in a shared legal sphere.¹²⁷ This could mean joint participation by each level of government in the formation and/or implementation of policies achieved either through formal or informal channels. According to Bader, ‘Cooperative federalism occupies a regulatory middle ground that best realizes the values of federalism, while simultaneously creating a useful paradigm shift away from dualist, regulatory-centred thinking about federalism.’¹²⁸ Cooperation could be achieved through dialogue between institutions at different levels of government which form or influence the policy output of the federal setup.

Cooperative federalism can be mistaken for other alternative dynamic federalism theories, because ‘Dynamic federalism has been a practically natural outgrowth of cooperative federalism.’¹²⁹ However, Bader draws a distinction between cooperative

¹²⁷ Schütze (n 114) 347.

¹²⁸ Bader (n 125) 3.

¹²⁹ *ibid* 10.

federalism and dynamic federalism.¹³⁰ His distinction is premised on the view that dynamic federalism entails overlapping regulatory jurisdiction while cooperative federalism situates uniformity and finality for first-order norms at the national level while allowing dialogue and plurality at the level of state implementation of those norms.¹³¹ He also argues that dynamic federalism is limited in terms of the parameters for dialogue and is dependent on formal enactments that produce contrary or inconsistent results. On the other hand, cooperative federalism invites dialogue on multiple interconnected planes, including during the adoption of law through the political process and the formulation and enforcement of state-specific implementation strategies.¹³²

Cooperative federalism is not alien to the federalism discourse especially in relation to the internal workings of a federal system. However in the foreign relations sphere, it is an idea which has struggled to gain acceptance due to the existing status quo which regards foreign affairs as a category where the central government has plenary powers. In the US, the focus in the preceding section, even though there has been a shift in emphasis from dual to cooperative federalism on the domestic front foreign affairs has been more resistant to such changes. According to Schütze, in the US, ‘The particularly aggressive presumption in favour of a federal pre-emption still makes foreign affairs special affairs.’¹³³ Schütze however points out that ‘...even if the presumption in favour of federal pre-emption is much stronger in the external sphere than in the internal sphere, this milder version of foreign affairs exceptionalism [in the US] can ultimately be integrated into a cooperative federal picture.’¹³⁴ This shows that cooperative federalism is not totally incompatible with foreign affairs even though it has struggled to gain ground in the US. This view is supported by the fact that in other jurisdictions such as Canada (North America) and Belgium (Europe), the concept of cooperative federalism in foreign affairs has found greater expression. It is understandable why cooperative federalism has found

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² Schütze (n 134) 347.

¹³³ *ibid* 122.

¹³⁴ *ibid.*

significant expression in Canada because the Canadian federalism has a loose structure which makes it closer to a confederation. In regard to Belgium, which is deeply fragmented along cultural and linguistic lines, cooperative federalism has evolved into a distinct institutional mechanism in the foreign policy sphere. The Canadian and Belgian experiences will be considered below. Studying the origin and historical evolution of cooperative federalism in these two systems is useful for identifying the normative characteristics of cooperative federalism in foreign relations. This is because the two systems provide distinctively dissimilar models. Canada is very informal and flexible; while Belgium is very formal and highly institutionalised.

5.4.1 Cooperative Federalism in International Trade Relations: The Canadian Experience.

The constitutional configuration of the federal system in Canada is premised on a relationship where the provinces have considerable autonomy from the central government in Ottawa.¹³⁵ With regards to international trade relations, Canada's involvement in global trade has not been exclusively controlled by the central government. This is mainly due to the constitutional uncertainty surrounding the allocation of powers on matters of international trade relations.¹³⁶ The constitutional provisions which relate to the allocation of powers between the central government and provinces for foreign relations include the treaty-making power, the trade and commerce power, and the Peace, Order and Good Government (POGG) clause in the Constitution Act, 1867.¹³⁷ These constitutional provisions did not give the federal government explicit control over foreign policy at the time of Confederation.¹³⁸ The only reference to the central government's role in international relations under the Constitution Act, 1867 is found in *s 132*, which grants the Dominion the authority to

¹³⁵ G Anderson and Andre Lecours, 'Foreign Policy and Intergovernmental Relations in Canada' in Michelmann (ed) (n 133) 21.

¹³⁶ Christopher J Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces' (2009) 14 (1) Rev Const Stud 21.

¹³⁷ 30 & 31 Vict c 3.

¹³⁸ Kukucha (2008) (n 94) 44.

implement treaties negotiated by Great Britain.¹³⁹ However over time, the central government's dominance over foreign affairs has expanded.¹⁴⁰ For example, Kukucha points out that in terms of treaty making the precedent from the case *Reference re: Weekly Rest in Industrial Undertakings Act* (the "Labour Conventions" case)¹⁴¹ was to the effect that the central government had the power to negotiate international treaties, only that it did not have the right to implement agreements in areas of provincial jurisdiction.¹⁴² This supposes a dualised conceptualisation of foreign affairs in Canada. However in subsequent cases, the Supreme Court of Canada took a cautious stance and did not rely on the precedence from the '*Labour Convention case*' in favour of either level of government, preferring instead to maintain a balance between federal and provincial authority in this area.¹⁴³ This was presumably calculated to encourage cooperation between the central government and the provinces on matters of foreign relations. In relation to the scope of trade and commerce power available to the central government under the Constitution Act, 1867, Kukucha points out that while Parliament was given control over the regulation of trade and commerce by virtue of section 91(2) of the Constitution Act, 1867,¹⁴⁴ this exclusive control was in reality subject to limitations. The limitations arose from the fact that the provinces were granted jurisdiction over property and civil rights including the regulation of contracts; that had a significant impact on the conduct of international trade.¹⁴⁵

The outlook of these provisions and the interpretation given by the courts show that the central government has enjoyed only a slight advantage over the provinces in

¹³⁹ Kukucha (2009) (n 143) 27. See also Bernier (n 72) 51.

¹⁴⁰ Kukucha (2009) (n 146).

¹⁴¹ [1937] AC 326.

¹⁴² *ibid.* See also France Morrisette, 'Provincial Involvement in International Treaty Making: The European Union as a Possible Model' (2012) 37 (2) *Queen's LJ* 577, 583.

¹⁴³ Kukucha (2009) (n 147) 27.

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*, see generally *Citizens Insurance Company v. Parsons* (1881) 7 App Cas 96. In this case, the Supreme Court of Canada did not use trade and commerce to entrench federal or provincial power. Instead, 'it reaffirmed that there was no federal power to regulate a single trade or business; and, it indicated that issues...must be determined on a careful case by case basis.'

relation to foreign affairs. The provinces have capitalised on these opportunities to express themselves at the international level, particularly in relation to trade promotion and the opening of trade offices in other countries.¹⁴⁶

In relation to the multilateral and regional trade systems which are the focus of this thesis, the central government has a more significant advantage over the provinces because international law has frowned upon the direct participation of SFGs in international trade agreements.¹⁴⁷ However, it is in this regard that cooperative federalism has flourished in Canada. Kukucha comments that for international trade policy:

...a slightly different relationship between Ottawa and the Provinces has evolved, primarily over issues of *consultation and participation*. At the international level, foreign trade agreements now include areas of sub-federal jurisdiction, such as services, agriculture, alcohol, government procurement, national health and safety standards, energy, and environment and labour issues.¹⁴⁸

With Canada's involvement in the multilateral negotiations of the GATT from the onset of the multilateral trade system in 1947, elements of cooperative federalism based on a federal-provincial committee system began to emerge in Canada's interaction with the international trade system. This system evolved in response to '(a) constitutional ambiguity regarding the role of the provinces in Canadian foreign policy and (b) the increasing relevance of non-central governments in this policy area.'¹⁴⁹

During the Kennedy rounds of GATT negotiations in the 1960s, consultation between Ottawa and the provinces on issues of international trade negotiation was already evident. Kukucha reports that

¹⁴⁶ Kukucha (2009) (n 152) 28-35; Anderson and Lecours (n 142) 21, 22-23.

¹⁴⁷ Kukucha (2008) (n 145) 44.

¹⁴⁸ Kukucha (2009) (n 153) 35.

¹⁴⁹ Kukucha (2008) (n 154) 43.

During the Kennedy Round, for example, some Provinces submitted formal reports on tariff policy to the federal government and called for greater involvement in the negotiations. Ottawa's response was tentative, however, and there was little indication that it would consider an expanded provincial role.¹⁵⁰

Even though Ottawa was still sceptical about the involvement of the provinces at this point in time, this marked the birth of channels of cooperation between the provinces and Ottawa in relation to international trade negotiations.

During the Tokyo round of GATT negotiations, the provinces became more active in international trade negotiations possibly because international trade norms were becoming increasingly interwoven into the domestic space of the Canadian federalism.¹⁵¹ Kukucha reports that:

By the time the Tokyo Round began in 1973, however, GATT's focus had shifted to the difficult issue of non-tariff barriers (NTBs). Negotiations on visible tariffs were replaced by discussions of subsidies, government procurement, and other technical barriers. Sectoral negotiations on fisheries, resource-based products, and agriculture also involved areas of provincial jurisdiction. This is why the Provinces demanded direct consultation with Ottawa. The federal government understood that, given the scope of the issues involved, it would need the support of the Provinces in order to negotiate a binding international agreement under GATT's federal state clause.¹⁵²

This intrusion of international trade disciplines during the 'Tokyo round' of negotiations necessitated the strengthening of linkages between Ottawa and the

¹⁵⁰ *ibid* 47. See also Ann Weston, 'The Canadian 'Model' for Public Participation in Trade Policy Formulation' (August 2005) The North-South Institute, Ottawa, Canada. 12 – 15 <<http://www.nsi-ins.ca/wp-content/uploads/2012/10/2005-The-Canadian-model-for-Public-Participation-in-Trade-and-Policy-Formulation.pdf>> accessed 10 April 2014.

¹⁵¹ Christopher J Kukucha, 'The Role of the Provinces in Canadian Foreign Trade Policy: Multi-Level Governance and Sub-National Interests in the Twenty-First Century' (2004) 23 (3) *Pol & Soc* 113, 134.

¹⁵² Kukucha (2008) (n 157) 47.

provinces. Canada's commitments under the multilateral trade negotiations of the GATT led to growing concerns for the provincial governments over federal policy initiatives that challenged SFG interests.¹⁵³ In response, the provinces 'especially Québec, Ontario, and Alberta, began to demand a more inclusive role in the formulation of Canadian foreign trade policy.'¹⁵⁴ Ottawa responded by attempting to institutionalise the interests of the provinces within the Canadian international trade mechanism by including a new **Federal Provincial Coordination Division (FPCD)** under the Ministry of External Affairs. The FPCD became responsible for keeping the provinces informed of all relevant Canadian international initiatives.¹⁵⁵ Other formal mechanisms for the input of the provinces in international trade negotiations included the **Canadian Trade and Tariffs Committee (CTTC)** introduced during the 'Tokyo round.'¹⁵⁶ The CTTC was responsible for gathering briefs from businesses, unions, consumer groups, the provinces and other interested parties during the Tokyo Round of negotiations at the GATT.¹⁵⁷ Subsequently, an '...ad hoc federal-provincial committee of deputy ministers was established in 1975, which was replaced by a **Canadian Coordinator for Trade Negotiations (CCTN)** in 1977.'¹⁵⁸ In 1985, during the build-up to the negotiations of the Canada-US Free Trade Agreement (CUFTA) Agreement, 'The Premiers of British Columbia, Alberta, Saskatchewan and Manitoba all announced their support for "full provincial participation."¹⁵⁹ This led to a commitment to continued consultation within the CCTN.¹⁶⁰

¹⁵³ Kukucha (2009) (n 155) 35.

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*

¹⁵⁶ David R Protheroe, *Imports and Politics: Trade Decision-Making in Canada, 1968-1979* (Institute for Research on Public Policy 1980)156.

¹⁵⁷ Kukucha (2009) (n 162) 36.

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid*; Patrick Fafard and Patrick Leblond, 'Twenty-First Century Trade Agreements: Challenges for Canadian Federalism' (2012) *The Federal Idea* <<http://ideefederale.ca/documents/challenges.pdf>> accessed 4 April 2014.

After the CUFTA agreement was implemented in 1987, the CCTN metamorphosed into the **Committee for the Free Trade Agreement (CFTA)** with each province having one official representative.¹⁶¹ A series of consultative committees were also instituted within various provincial departments to cater for sectorial concerns.¹⁶² The use of such committees became popular in the central government - provincial relationship on international trade negotiations throughout the 1980s.¹⁶³ For example during negotiations for the NAFTA, an additional committee - **the Committee for North American Free Trade Negotiations (CNAFTN)** was introduced along with the CFTA.¹⁶⁴

Although the CNAFTN was tailored specifically for the NAFTA negotiations, it subsequently metamorphosed into the **Federal-Provincial- Territorial Trade Committee (CTRADE) system**. CTRADE is the current federal – provincial cooperation forum in Canada. It involves a series of meetings between Ottawa and the provinces which are held four times annually.¹⁶⁵ Both levels of government engage in consultations and information sharing, which includes Ottawa making draft documents available to the provinces when Canada enters negotiations in areas of provincial jurisdiction.¹⁶⁶ ‘The provinces are encouraged to provide feedback and guidance on these proposals and federal negotiators are sensitive to the economic interests of the provinces.’¹⁶⁷ In addition to the CTRADE forum, Kukucha identifies three other forms of consultation which take place between federal and provincial governments on matters relating to international trade:

First, there is almost always more than one department at the provincial level in contact with Ottawa on international trade matters. Many of the

¹⁶¹ Fafard and Leblond (n 167) 5-6. See also Axel Hulsemeier, *Globalisation and Institutional Adjustment: Federalism as an Obstacle?* (Ashgate 2004).

¹⁶² Kukucha (2009) (n 167) 35.

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ Kukucha (2008) (n 159) 52.

¹⁶⁶ *ibid.* 54. See also Fafard and Leblond (n 168) 22.

¹⁶⁷ Kukucha (2008) (n 173).

larger Provinces have specific departments to coordinate CTrade and other foreign trade policy considerations. And even where these coordinating mechanisms exist, most Provinces have other officials responsible for trade policy in a wide range of departments. Ministries of environment, agriculture, finance, and forestry all have interests related to international economic policy that need to be protected.¹⁶⁸

In summary, cooperation between Ottawa and the provinces on matters of international trade policy has been the most distinct expression of cooperative federalism in Canada. Based on the successes achieved in the international trade policy sphere, there have been calls for this model to be transplanted to other policy areas such as labour and the environment.¹⁶⁹ In addition, constitutional formalisation of the existing channels of cooperation has been demanded by some provinces but rejected by Ottawa.¹⁷⁰ Although the system is without any constitutional entrenchment, its development over the years has largely been very successful in maintaining the balance between the provinces and the central government at Ottawa and has led to the crystallisation of a system of cooperative federalism in Canada's international trade policy mechanism.

5.4.2 Cooperative Federalism in International Trade Relations: The Belgian Experience

Belgium is made up of three Communities (the Flemish Community, the French Community and the German-speaking Community); three Regions (the Flemish Region, the Walloon Region and the Brussels Region); and four linguistic regions (the Dutch-speaking region, the French speaking region, the bilingual region of Brussels-Capital and the German-speaking region).¹⁷¹ In view of the multifarious

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid* 58.

¹⁷⁰ *ibid* 56.

¹⁷¹ See art 1-4 of The Belgian Constitution.

composition of the Belgian state, the federal system in operation in Belgium has evolved in tandem with these diversities.¹⁷²

With regard to the conduct of foreign policy, there is a formal constitutional structure for shared competence and cooperation among the component units of the Belgian federation.¹⁷³ This formalized process of cooperation is encapsulated in Art 167 (1) of the 2007 Belgium Constitution which stipulates inter alia for shared competence between the King, Communities and Regions ‘To regulate international cooperation, including the concluding of treaties, for those matters that fall within their competences in pursuance of or by virtue of the Constitution.’¹⁷⁴

This constitutional arrangement between the components of the Belgian federation has been progressively negotiated over time through a series of Special Acts on the Belgian Federal State Reform. Notable constitutional milestones in the development of the Belgian foreign policy system include The Institutional Reform Act of 8 August 1988. This Act introduced the constitutional principle of *in foro interno in foro externo* and the *absence of hierarchy* between different levels of administration.¹⁷⁵ The terms *in foro interno in foro externo* are Latin phrases which literally mean: in foro interno (‘in the inner court’) and in foro externo (‘in the outer court’).¹⁷⁶ In the context of foreign policy *in foro interno in foro externo* are used in

¹⁷² Francoise Massart-Pierad and Peter Bursens, ‘Belgian Federalism and Foreign Relations: Between Cooperation and Pragmatism’ in Michelmann (ed) (n 142) 18ff, 19-20.

¹⁷³ Michael Keating, ‘Regions and International Affairs: Motives, Opportunities and Strategies’ (1999) 9(1) Reg & Fed Stud 1, 11.

¹⁷⁴ *ibid.* see Title IV Belgian Constitution. See also Stéphane Paquin, ‘Federalism and Compliance with International Agreements: Belgium and Canada Compared’ (2010) 5 Hague J Dip 173, 184-185. Other federal systems which have constitutional provisions formalising cooperation on foreign policy are, Argentina and Austria. For Argentina: see s 124 and 125 National Constitution of the Argentine Republic 1994 <http://pdpa.georgetown.edu/Constitutions/Argentina/argen94_e.html> accessed 12 May 2014. See also Eduardo Iglesias, ‘Argentina: The Growing Role in Foreign Affairs’ in Michelmann (ed) (n 179) 9. For Austria: see art 23e of the Austrian Federal Constitutional Law (as amended in 1989). See also Stefan Hammer, ‘Austrian Federal Relations: Federal Precedence and Informal Regional Linkages’ in Michelmann (ed) (n 179) 15.

¹⁷⁵ Paquin (n 181) 185; Massart-Pierad and Bursens, (n 179) 96 (extended version), 19 (Booklet Series).

¹⁷⁶ These terms were popularly used by Thomas Hobbes to explain the difference between how man processes the external and internal aspects of the law of nature. See generally, K Hoekstra, ‘Hobbes on Law, Nature, and Reason’ (2003) 41(1) J His Phil 111; Jonathan Bennett, ‘Selections from Thomas Hobbes — Leviathan’ <http://www.woldww.net/classes/General_Philosophy/Hobbes_on_the_state_of_nature.htm> accessed 24 April 2014.

the context of how the external competences of the regions in Belgium are directly correlated with their internal competence under the Belgium constitution.¹⁷⁷ According to Paquin, the implication of this is that 'Belgian SFGs possess a true international legal personality and, in practice, this means that foreign countries and international organizations can, if they want, negotiate and conclude real treaties with Belgium's SFGs.'¹⁷⁸

The revision of the Constitution in 1993 built on the 1988 reform by further adapting the organization of Belgium's cooperation mechanism for international relations along the unique configuration of the Belgian federal system.¹⁷⁹ This led to the introduction of three distinct categories of agreements in Belgium: 1) treaties that exclusively involve the powers of the federal government and that are concluded and ratified by this same federal government; 2) treaties related exclusively to community or regional powers and that are concluded and ratified by communities and regions; and 3) mixed treaties.¹⁸⁰ Paquin explains how each category of treaties works thus:

When a treaty project is brought to the attention of the federal government, it must inform the other levels of government. The regions and communities can then ask to be a party to the treaty if it affects their fields of jurisdiction. It is only after negotiation between the various parties that there is a decision about the category of the proposed treaty.

When an agreement involves federal powers and either community or a regional power at the same time, the treaty is concluded according to a special procedure convened among the different orders of government. It must also be approved by all of the parliaments involved. Mixed treaties require twenty different steps to complete the whole procedure.¹⁸¹

¹⁷⁷ Massart-Pierard and Bursens (n 182) 96.

¹⁷⁸ Paquin (n 182) 185.

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

In the context of international trade relations, these special reforms have empowered the three regions in Belgium with competences for determining policy with regard to international trade in areas such as foreign markets and exports (without prejudice to any national policy to coordinate and promote foreign trade and to cooperate in that area).¹⁸²

This unique approach adopted by Belgium is not without its challenges. Essentially, the model of shared competence adopted creates a complex labyrinth of actors and multifaceted issues. To cater for these complexities, the constitutional reforms have introduced institutional and constitutional checks. For example, the 1993 reform introduced three notable constitutional restrictions on the powers of the regions in relation to their activities in the international arena. First, there is the substitution mechanism under art 169 of the 1993 and 2007 Constitutions. This states that if a region does not adhere to an international or EU commitment and it is convicted by an international court, then the central government can substitute for the region (but not the other way round) to ensure compliance.¹⁸³ According to Bursens and Massart-Pierad, this restriction was introduced in anticipation that shared competence between the regions and the federal government on foreign policy could lead to coordination problems.¹⁸⁴ Second, it was stipulated in the reform of 1993 that the foreign policy activity of the regions must not contradict the broad orientations of the commonly agreed foreign policy of the Belgian state (this refers to areas of shared ideology such as democracy, national security etc.).¹⁸⁵ Third, the regions and communities are obliged to inform the federal government of any foreign activities they are involved in.¹⁸⁶

¹⁸² See generally, the Lambermont Accords of 29 June 2001 which had the effect of regionalizing international trade in Belgium. See also Kingdom of Belgium Foreign Affairs, Foreign Trade and Development Cooperation
<http://diplomatie.belgium.be/en/policy/economic_diplomacy/division_of_powers/> accessed 03 June 2014; Paquin (n 188) 186ff, 190.

¹⁸³ Bursens and Massart-Pierad (n 184) 97-98.

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid* 98.

¹⁸⁶ *ibid.*

Another constitutional method adopted to ensure coordination on foreign policy is the use of Cooperation Agreements.¹⁸⁷ According to Bursens and Massart-Pierad, Cooperation Agreements ‘broadly frame the application of Belgium’s external relations by involving the various bodies involved.’¹⁸⁸ In essence, these agreements are intended to ensure that all the relevant stakeholders to foreign relations in Belgium are carried along concerning decisions made by any particular actor. An example of such a Cooperation Agreement is the one between the regions and the federal government, catering for Belgium’s participation in the EU Council of Ministers. Under this agreement, ministers of the federative states can represent Belgium and conclude agreements in its name.¹⁸⁹

The institutional checks available to ensure coordination on foreign policy are mainly in the form of committees which are designed to maximise effective coordination by minimising potential friction among stakeholders. For example, there is the Inter-ministerial Committee on Foreign Policy (ICFP).¹⁹⁰ The ICFP Secretariat is maintained by the Foreign Service in charge of relations with Communities and Regions.¹⁹¹ It does not meet on a regular basis with an average of two meetings happening per year.¹⁹² Therefore, the system also relies on informal meetings between cabinet-level personnel and civil servants from both levels of government.¹⁹³ The primary objective of this committee is to minimise friction in the coordination mechanism on foreign policy by dealing with political conflicts.¹⁹⁴ It achieves this through a mechanism of dialogue and information exchange between the centre and the regions.¹⁹⁵

¹⁸⁷ *ibid* 101.

¹⁸⁸ *ibid*.

¹⁸⁹ Paquin (n 189) 189.

¹⁹⁰ *ibid* 187.

¹⁹¹ *ibid*.

¹⁹² *ibid* 188.

¹⁹³ *ibid*.

¹⁹⁴ *ibid* 101.

¹⁹⁵ *ibid* 187.

From the foregoing, it is clear that compliance with international trade norms in Belgium is a product of joint participation by the central government and regional governments under a formalised and constitutionally recognised framework. Compared with Canada, the intergovernmental mechanisms in Belgium are highly institutionalised.¹⁹⁶ As such, Belgium's compliance with international trade agreements is negotiated by all stakeholders and any decision reached is deemed to be the common position of the Belgian state.¹⁹⁷ At this point in the analysis, the focus has been on describing the key elements of cooperative federalism as found in the two federal systems discussed above. In chapter six, the deficiencies in the operation of cooperative federalism in these two federal jurisdictions are considered.¹⁹⁸

5.4.3 The Normative Characteristics of Cooperative Federalism in International Trade Relations

From the details of the relationship between the provinces/regions and the central governments in the two countries discussed above, some distinct normative characteristics of cooperative federalism in international trade relations can be deduced.

Cooperative federalism in international trade relations is based on intergovernmental cooperation amongst relevant stakeholders to the international trade process in a federal system.¹⁹⁹ The experiences in Canada and Belgium demonstrate that the core theory of cooperative federalism is reflected in the level of flexibility and coordination in the relationships between different levels of government in a federal system.²⁰⁰ Cooperative federalism is workable in multiple subject areas (e.g. trade, environment, culture and education) which are of mutual interest to all the levels of government in a federal system. However, the level of cooperation obtainable in any

¹⁹⁶ *ibid* 173, 177.

¹⁹⁷ *ibid* 184-187.

¹⁹⁸ In section 6.2.1 at p 234 *infra* the challenges facing the Belgian cooperative model is discussed.

¹⁹⁹ Bader (n 138). The system is not closed to non – governmental actors in the process of cooperation. But the primary focus of the discussions in this thesis is on governmental actors in federal systems as stakeholders in international economic relations.

²⁰⁰ This is however, subject to the limitations of the actual practice of cooperative federalism in this jurisdictions discussed in chapter six, section 6.2.3.

subject area depends on the priority level given the subject matter (both by the central and SFGs) and whether or not the subject matter falls under an area which Criekemans categorises as ‘conflictual’ or ‘cooperational.’²⁰¹ According to him, areas which are ‘conflictual’ are usually less amenable to strong cooperation between levels of government.²⁰² Based on this categorisation, it is argued that issues relating to international trade are usually of high priority for both central governments and SFGs because trade and investment is essential to the survival and development of the state as a whole; hence they are ‘cooperational’ and ideal for the emergence of cooperative frameworks. Both the Canadian and Belgian experiences demonstrate that international trade is a ‘cooperational’ subject matter. As international trade norms have expanded into areas where the provinces/regions have competence and/or interest for their development objectives, it became imperative for a framework for coordination to emerge so as to ensure that the interests of all stakeholders are effectively aligned.²⁰³

In some instances, cooperation becomes necessary where a particular subject matter has a transnational impact which the central government is incapable of effectively handling alone. As such, cooperative federalism becomes a functional imperative (irrespective of a formal or informal structure in place) which is necessary if such an issue-area is to be effectively handled.²⁰⁴

Climate change is an example of a subject matter having transnational impact which has proved difficult for central governments to handle without coordinating with other SFGs and non-state actors. Kaswan supports this view by proposing the application of cooperative federalism model to climate-change legislation in federal systems (in particular, she emphasises the need for federal regulators to work with

²⁰¹ See David Criekemans, ‘Are the Boundaries between Paradiplomacy and Diplomacy Watering Down?’ (World International Studies Committee (WISC) 2nd Global International Studies Conference, Slovenia, July 24 2008).

²⁰² *ibid.*

²⁰³ Kukucha (2004) (n 158) 115.

²⁰⁴ Anderson and Lecour (n 153).

states to develop implementation plans) primarily because central governments cannot achieve its goals working alone.²⁰⁵

Cooperative federalism operates through formal and informal channels which present a forum for dialogue between the different levels of government on ‘...multiple interconnected planes, including during the adoption of law through the political process and the formulation and enforcement of state-specific implementation strategies.’²⁰⁶ Dialogue in this sense is purposeful and done with terms of reference which are designed to encourage participation (proactive and reactionary input) by SFGs in the international trade process. According to Bader, ‘In cooperative models, states must engage both federal and local authorities in interpreting and implementing federal regulatory schemes. Without their participation, the system would not exist.’²⁰⁷ The Canadian experience shows that Ottawa had to demonstrate a sense of commitment to implementing the mechanisms for cooperation between them and the central government or risk having the provinces exploit the loopholes in the constitutional provisions to take counterproductive action. The provinces had already demonstrated their ability to disrupt the international relations objectives of Ottawa if they were not given proper audience. Therefore, Ottawa was sensible enough to bring the provinces on board, irrespective of their reservations.²⁰⁸ The Canadian experience also shows that the contribution of the provinces was not a mere formality. For example, during the negotiations of the US – Canada FTA, the provinces justified their inclusion in the process. Kukucha, quoting Brown stated that:

[T]he degree of input from the Provinces exceeded that of most other domestic actors, including the private sector, other federal departments and [P]arliament. Only the TNO itself, the Prime Minister’s Office and

²⁰⁵ Alice Kaswan, ‘A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System’ (2008)85 Denv U L Rev 791.

²⁰⁶ Bader (n 205) 21.

²⁰⁷ *ibid* 26.

²⁰⁸ Kukucha (2008) (n 177) 53.

the special sub-committee of the federal cabinet on trade appeared to have greater access to the negotiating process.²⁰⁹

The scope of cooperative federalism in international trade is not restricted only to dialogue but also extends to ‘permitted policy action’ taken by SFGs. This is usually coordinated and supervised by the central government. This is demonstrated in the Belgian example where permitted policy action by the regions is backed by constitutional provisions but is still controlled by checks and balances such as the use of cooperation agreements and the constitutional restrictions under art 169 of the Belgian Constitution. The Belgian example shows that these permitted policy actions are not restricted only to the implementation and enforcement aspects of the international trade process (as is the case in Canada) but also include active participation in the negotiation process.²¹⁰ This does not mean that the extent of the input of the SFGs in the policy process of federal systems is dependent on the level of legitimacy which SFGs are accorded within the regime. As Gerken points out, the power of dissent is another way in which the SFGs (this encompasses a broader scope of minority state and non-state actors in a federal system) can contribute to the policy process in federal systems.²¹¹ The effectiveness of dissent as a tool for facilitating cooperation in the area of international trade relations is identifiable in the Canadian experience. For example, during the Doha multilateral negotiation and the NAFTA negotiation processes, the provinces’ objection to certain issues was reflected in the final negotiation position adopted by Canada.²¹² Specifically, Kukucha identifies that the original US proposal for art 2.2 of the WTO Agreement on Subsidies and Countervailing Measures (SCM), which Washington intended to use as a limitation on the competitive state subsidies in Canada, was opposed by Canada because the provinces- specifically Ontario and Quebec- opposed it during

²⁰⁹ W Mark Brown, ‘Overcoming Distance, Overcoming Borders: Comparing North American Regional Trade’ (2003) Statistics Canada, Economic Analysis (EA) Research Paper Series No 2003008e < <http://www.statcan.gc.ca/pub/11f0027m/11f0027m2003008-eng.pdf>> accessed 26 May 2014 cited in Kukucha (2008) (n 213) 51.

²¹⁰ Massart-Pierard and Bursens (n 195) 103.

²¹¹ See generally, Heather K Gerken, ‘Second-Order Diversity’ (2005) 118 Harv L Rev 1099.

²¹² Kukucha (2009) (n 171) 37.

the negotiation process.²¹³ In effect, cooperation can be achieved directly (where there is constitutional enfranchisement, as is the case in Belgium) or indirectly by dissent and/or pressure (where there is none or limited constitutional enfranchisement, as is the case in Canada).²¹⁴

Cooperative federalism places more emphasis on the political process rather than judicial interference. In relation to international trade relations in Canada, the courts have been cautious in their pronouncements, ensuring that their interpretations on the allocation of powers between the central and SFGs on matters of international trade relations do not overtly favour one side to the detriment of the other. Erin Ryan's system of 'negotiated federalism' which is a cooperative federalism model, supports this position advocating that the courts in their review of central – state relationships should accord more deference to a result where greater political and classic bargaining safeguards exist.²¹⁵ She argues that this will help mediate the tension or the 'tug of war' between the core normative values of federalism.²¹⁶ Referring to the Canadian example, Kukucha points out that the Supreme Court of Canada was cautious in its pronouncements after the '*Labour Convention*' case²¹⁷ in a bid to maintain a balance between federal and provincial authority in this issue-area.²¹⁸ This was presumably done to allow the political process to flourish seeing as judicial interference tends to take sides which leads to constitutional line-drawing and conflict. This does not mean that the judiciary is not involved in the process; rather cooperative federalism advocates that the role of the judiciary should be as a facilitator for the enhancement of the cooperation process. Bader points out that in view of the ever growing challenges facing federal systems, 'Instead of fighting and

²¹³ *ibid.*

²¹⁴ The significance of this distinction will be examined in chapter six, where the options for cooperative federalism available for the selected case study – Nigeria will be considered.

²¹⁵ Erin Ryan, 'Negotiating Federalism' (2011) 52 (1) BC L Rev 114.

²¹⁶ Erin Ryan, 'Federalism and the Tug of War Within: Seeking Checks and Balance in the Inter Jurisdictional Grey Area' (2007) 66 Md L Rev 503, 567-95.

²¹⁷ The *Labour Convention* case set the precedence that the central government had the power to negotiate international treaties, only which it did not have the right to implement agreements in areas of provincial jurisdiction.

²¹⁸ Kukucha (2009) (n 218) 27.

line-drawing, the Court and regulators can [sic] seek to work together in order to solve problems which have become ever more complex.’²¹⁹ This has been particularly important in international trade relations because the evolving international trade system has placed more demands on federal relations, which necessitates cooperation.

The above example shows that cooperative federalism does not mean the absence of conflict in the central – state relationship. Irrespective of its quality as a position of compromise between centralisation and decentralisation, it is inevitable that compromise is not always achieved amicably. Thus, cooperative federalism entails the participants to the process disagreeing to agree. This could mean hard fought battles and the necessity of judicial intervention to settle issues that the political process cannot resolve. For example, in relation to ‘inter jurisdictional grey areas’ where there are no clear boundaries of state or federal powers, Erin Ryan has urged the Court to adopt a deferential test in ascertaining which level of government should prevail on a policy issue.²²⁰

Cooperative federalism does not focus primarily on how to achieve state regulatory autonomy, but rather seeks to explore practical methods for balancing national and state power in relation to specific subject areas which are of mutual interest to both levels of government. For example, cooperative federalism models such as ‘Balanced Federalism’ and ‘Uncooperative Federalism’ emphasise the need for state participation in the policy formulation process instead of pursuing state regulatory autonomy.²²¹ ‘This way, states thereby gain ex ante and ex post opportunities to influence federal law.’²²² This makes the process flexible and open to both formal and informal methods for achieving mutual agreement on policy issues.²²³ The EU’s model of multilevel-governance via the instrumentality of the subsidiarity principle is a good example which demonstrates the range of flexibility possible with a

²¹⁹ Bader (n 212) 31.

²²⁰ *ibid.*

²²¹ *ibid* 26.

²²² *ibid.*

²²³ *ibid* 14ff, 23.

cooperative approach to balancing competing rights in a federal process.²²⁴ With the aid of Open Methods of Coordination (OMC) such as reflexive harmonisation, the EU has designed practical ways to promote diversity in its rule-making by accommodating second order rule-making from the state and non-state actors within the member states.²²⁵ To maintain standards and ensure the promotion of best practices, the Commission sets benchmarks as a framework for these SFGs to act.²²⁶ The EU's soft law approach has not been selected for in-depth analysis because the application of these cooperative methods of rule-making are not applicable to international trade; it is within the exclusive competence of the EU Commission because it falls under the Commission's express external competence to act on commercial policy.²²⁷

From these examples, it is clear that cooperative federalism can manifest with or without constitutional commitment as demonstrated by the different approaches adopted by Canada and Belgium respectively. What is essential in the cooperative federalism structure is that two or more levels of government in a federal setup establish complementary legal rules or fora within a policy area.²²⁸

The characteristics which have been identified above show that cooperative federalism is a theory of intergovernmental cooperation applicable to federal setups, which can exist either as a constitutional doctrine or as a functional manifestation of joint participation on a specific policy area. The normative characteristics of this theory which have been deduced from the Canadian example show that it is applicable to international trade relations. In the next section, the theory will be

²²⁴ Schütze (n 141)347; Gavin (n 115).

²²⁵ B Ter Haar, 'Open Method of Coordination: A New Stepping Stone in the Legal Order of International and European Relations' (2008) 77 *Nordic J Intl L* 235, 236. Ter Haar describes the OMC as a practical instrument, which offers a process of mutual, cross-national learning in a setting of multi-level participation..

²²⁶ See generally, Deakin (n 24).

²²⁷ See R Holdgaard, *External Relations Law of the European Community* (Kluwer 2008) 22; Schütze (n 229) 291-303. See also *Commission of the European Communities v Council of the European Communities* 2 Case 22/70 (1971) (The ERTA case). This case expanded the scope of enumerated powers for the EC (via the principle of 'implied external powers') to act on behalf of the member states in foreign relations.

²²⁸ Schütze (n 232) 347.

appraised based on its advantages and disadvantages so as to ascertain how credible it is as an alternative framework of choice to replace constitutional exclusivity in Nigeria's international trade interactions.

5.4.5 The Advantages and Disadvantages of Cooperative Federalism in International Trade Relations.

Advantages

1. Cooperative federalism as a corrective to dual federalism

Cooperative federalism is widely acclaimed as a successor and a corrective to dual federalism.²²⁹ With the criticisms which have been levelled against dual federalism in light of the changes in international relations, cooperative federalism has been heralded as a more practical way of managing federal – state relations.²³⁰ In the context of international trade relations, this has been a very intriguing transition because foreign relations (including international trade) has for a long time been regarded as immune from the dictates of federalism. However, a nuanced shift in ideology has gradually occurred and this places cooperative federalism in a vantage position over other alternative federal models. This is because cooperative federalism seeks to balance the competing interests within a flexible framework which is not dependent only on constitutional formality to operate. Thus, it promotes shared competence between levels of governments while maintaining the distinct characteristic of ensuring that the uniformity and stability which come from central oversight are not discarded. Furthermore, cooperative federalism shifts the focus away from the sovereignty debate and calls for state autonomy and rather focuses on ensuring that the interests of both levels of government are adequately represented in the policy output of the federal set-up.

²²⁹ Robert A Schapiro, 'Toward a Theory of Interactive Federalism' (2005) Emory University School of Law Public Law & Legal Theory Research Paper Series Research Paper No 05-14 57; Schütze (n 233) 350.

²³⁰ See generally Bader (n 224) 8.

2. Cooperative federalism encourages participation of all stakeholders to the international economic relations

The cooperative federalism framework makes room for the participation of all relevant stakeholders (state and non – state alike) in the international trade process without necessitating a radical reform of the constitutional framework in place. In line with the working criteria adopted in chapter four outlining the attributes of an ideal trade policy framework, cooperative federalism is a good fit for achieving these ideals. This is because cooperative federalism gives ample room for the representations of all stakeholders proportionate to their relevance in the trade process. It transcends a rigid conception of selective relevance to the trade process which is found in the existing status quo of central exclusivity in international trade relations. For example in Nigeria, the centralised policy model on international trade relations regards the federal (central) government as the only recognised subject of international trade; the importers and exporters under the auspices of their representative bodies are regarded as the objects of international trade, while the position of the SFGs has been a subject of controversy. More so, the practice of international law in the pre-globalisation era permitted such a status quo. However, in a new dispensation of international trade relations, cooperative federalism has the advantage of flexibility which can accommodate new actors into the trade process without necessitating a radical shift in the constitutional framework in place.

3. Bottom-up approach to international trade policy formulation

Cooperative federalism encourages a ‘bottom-up’ approach to international trade policy formulation. With the linkage between the different levels of government, cooperative federalism allows policy to emanate from the lower levels of government where there is the closest contact with the objects of international trade and make its way up to the upper echelons of the trade policy mechanism. The advantage of a ‘bottom-up’ approach in policy formulation is that it enhances better implementation of trade policy; the lower levels of government have a sense of participation knowing their output is reflected in the international trade policy of the country. It also enhances the final output of international trade policy by encouraging the incorporation of trade concerns at the lower levels of government into the trade

policy output. Furthermore, it encourages knowledge sharing, regulatory experimentation and a learning process.

4. Cooperative federalism can help to curb rebellious activities of sfgs in an era of complex international trade relations

Cooperative federalism helps to enhance regulatory coherence and maintain peaceful coexistence in a dispensation of international trade relations characterised by opportunities for SFGs to engage in aggressive foreign policy which is detrimental to the general foreign policy objectives of the federal setup. This is because the output of SFGs does not go unsupervised under a cooperative model. The channels of interaction between SFGs and international trade partners are specified by mutual agreement between both parties so that SFGs are less likely to deviate from the established framework. Cooperative federalism actually makes it easier for a federal setup to operate in the international trade system with one voice and comes with the added benefit of diverse representation from its component units.

Disadvantages

In this section, the disadvantages of cooperative federalism and a response to these criticisms will be discussed.

1. Cooperative federalism lacks substance because of its flexibility

Based on its practical approach and flexibility, cooperative federalism has been criticised for not having any substance outside the parameters permitted by the federal government.²³¹ Critics of the cooperative federalism model are of the view that the idea of ‘cooperation’ is decidedly one-sided because in practice, SFGs have autonomy only to the extent which the federal government allows.²³² Schapiro, in his support of the views of Elazar, argues that ‘What cooperative federalism lacks is an adequately specified normative theory’ and that ‘Little work has been done to flesh out the constitutional framework of such a normative theory of cooperative federalism.’²³³ Thus, a perceived drawback with the cooperative federalism model is

²³¹ *ibid.*

²³² *ibid.*

²³³ Schapiro (2005) (n 234) 55-56.

that its quest to attain cooperation within a flexible framework makes it less amenable to a definite normative theoretical structure.

Response to criticism

This criticism is unfounded because a norm simply means ‘That which is a model or a pattern; a type, a standard.’²³⁴ These criticisms do not recognise the formal mechanism for cooperation which has progressively evolved in Belgium. More importantly, in the area of international trade, the Belgian experience shows a distinct pattern of engagement which is normatively distinguishable. This is encapsulated in the use of constitutional and institutional mechanisms for maximising the relationship between the regions and the central government. So, to criticise cooperative federalism as lacking an adequately specified normative theory means that it is devoid of any standard pattern. This is not correct because there are some specific qualities which have been identified from two different country experiences. For example, a distinguishable pattern of cooperative federalism deduced from Canada and Belgium is the use of committees which coordinate the interactions between stakeholders.

2. Complications and conflict arising from overlapping regulations

Based on the advantage of elasticity discussed earlier, a criticism of flexibility in the cooperation process is that like all other alternative federalism models which advocate shared competence it has the potential to create complications and conflict; arising from a labyrinth of overlapping regulations which emanate from different levels of government. Cooperation in a system of complex international economic interactions entails committing enormous resources and manpower to maintain the channels of communication between all relevant stakeholders. More so, it is argued that having so many representations in the foreign affairs sphere erodes the elements of finality and certainty which are important for efficient international relations.

Response to criticism

²³⁴ The Oxford English Dictionary
<<http://www.oed.com/view/Entry/128266?rskey=1KVbE7&result=1&isAdvanced=false#eid>>
accessed 03 June 2014.

This criticism is not unfounded because it is essential to have clarity and finality in the international relations. However, in view of the complexities which are inherent in the current dispensation of international economic relations, one noticeable consequence is that certainty, finality and clarity are no longer easy to achieve; even under the status quo of central exclusivity in international relations. For example, with the regional and multilateral trade system pulling at different directions, the international trade system has had to grapple with these complexities by acknowledging the realities of coexistence between regionalism and multilateralism. As such, the emergence of a labyrinth of complicated overlapping interactions between a federal system and the international economic system is not just a potential consequence if cooperative federalism is adopted, but a reality which already exists due to the external changes in institutional dynamics of international economic relations. Thus, it is argued that by encouraging interaction, dialogue, consultation and shared competence on interconnected planes, cooperative federalism serves a practical purpose in a quest for coherence within an already complex system. In essence, cooperation is a response to complications (rather than a cause of complications) which already exist in this dispensation of international economic relations.

3. Conflict arising from overlapping regulation in the same legal sphere

Another challenge with overlapping regulations is that it could lead to conflict. Cooperative federalism has been criticised by Schapiro for breeding conflict between the cooperating parties without providing a method for managing these conflicts.²³⁵ He argues that ‘Cooperative federalism blesses the voluntary interaction of state and national government...’ but ‘...does little to sort out the conflicts that may arise in the relationship.’²³⁶ These conflicts could arise between the horizontally arrayed components of the federal setup and also between the SFGs and the federal government.

²³⁵ Schapiro (2005) (n 238) 56.

²³⁶ *ibid.*

Response to criticism

This criticism is also inaccurate because cooperative federalism has a method for sorting out conflict arising from the process of cooperation. This is achieved through the political process and also with a limited interference of the courts. The Canadian experience shows that the interaction between the provinces and Ottawa was not always amicable during the development of the channels of cooperation on international trade negotiations.

4. Cooperation based on shared competence could lead to sub-optimal regulation and create a ‘race to the bottom’ effect

There is a danger that permitting SFGs to implement trade policy within a framework of shared competence could breed unhealthy competition amongst SFGs. This could arise when SFGs, in a bid to maximise the benefits of trade policy in its implementation within the domestic realm, lower regulatory standards to dangerous limits. This could lead to sub-optimal regulation and create a ‘race to the bottom’ effect. This is an issue normally associated with decentralisation i.e. regulatory competition. However, the aspect of cooperative federalism which permits shared competence on matters of implementation bears similar attributes with regulatory competition. It is this potential for competition among SFGs in an implementation strategy that could create a race to the bottom effect in a cooperative federalism model.

Response to criticism

The empirical evidence emanating from the existing literature on regulation is not conclusive on the effect of decentralisation on the quality of regulation.²³⁷ Moreover, cooperative federalism offers a balanced form of decentralised regulation i.e. ‘a tempered policy-optimization process’ which has the advantage of central

²³⁷ See generally Delia Rodrigo and others, ‘Multi-Level Regulatory Governance: Policies, Institutions and Tools for Regulatory Quality and Policy Coherence’ (2009) OECD Working Papers on Public Governance No 13 OECD Publishing <<http://dx.doi.org/10.1787/224074617147>> accessed 13 May 2014.

supervision to ensure that regulation is only permitted at lower levels where it is efficient to do so.²³⁸

5. Setting boundaries on the activities of sfgs conflicts with the flexibility attribute of cooperative federalism

The concept of flexibility inherent in a cooperative federalism model is at variance with the notion of placing boundaries on the scope of SFG involvement in the international trade process. One of the criticisms made earlier is that cooperation is ‘decidedly one sided because ‘states have autonomy only to the extent the federal government allows it.’ So if boundaries are put in place to ensure that SFGs toe the line of the central government’s overall foreign policy objectives, then the functionality of cooperative federalism as a flexible platform for joint participation between the central government and SFGs may be overestimated.

The contradiction between flexibility and boundary setting is an issue which cooperative federalism faces in its theoretical validation in this new dispensation of international trade relations. There is an inevitability that the international trade system will continue to change and this could further increase the propensity for rebellious activities by SFGs. Thus, this thesis does not presume to explain away this deficiency in the theoretical strength of cooperative federalism concerning modern international trade relations. However, it can only be hoped that a balance can be struck between boundary setting and flexibility. According to Bader, cooperative federalism acknowledges the importance of central oversight but the ‘Cooperative models place measured emphasis on uniformity and finality.’ The key to finding the balance is in placing ‘measured emphasis’ on uniformity and finality. This way the quality of flexibility in cooperative federalism will not be sacrificed in a bid to check the excesses of SFGs on the international scene.

5.4.6 Conclusion

The arguments in this chapter are to the effect that flexibility is a core component of cooperative federalism while rigidity is found in the central exclusivity model. It was shown in the historical analysis of the American federalism that central exclusivity

²³⁸ Bader (n 237) 28.

has been very opposed to change in power allocation concerning matters of international trade relations.²³⁹ The insistence on a presumption in favour of central jurisdiction on matters of international trade is not consistent with the realities of international trade interactions in the 21st century. Strict adherence to the conventional doctrine only creates a divergence between theory and reality. The practicability of cooperative federalism is that it is a sensible approach towards balancing constitutional tradition with functional realities in international trade relations in the 21st century. Cooperative federalism may lack the concrete feel which comes from constitutional definition but its flexibility is an advantage which makes it a realistic model for managing international trade interaction in this new dispensation of international trade. Furthermore, considering the fact that there are uncertainties surrounding the emerging outlook of international trade in the coming years, adherence to a fixed structure seems inappropriate in the long run.

Now that the existing and contending theories have been examined, the position of this thesis is that the attributes of cooperative federalism make it a practical method for balancing the external and internal process of Nigeria's international trade mechanism. In the next chapter, the implementation of cooperative federalism in Nigeria will be examined.

²³⁹ Schütze (n 233) 111.

Chapter Six: A Cooperative Approach for the Management of International Trade Relations in Nigeria: A Case for Reforms.

6.1 Introduction.

In chapter three, it was argued that the international trade system has evolved to accommodate new actors (sub-national and non-state actors) in the international trade interaction of federal systems. With regard to Nigeria, the analysis carried out in chapter four identified that Nigeria's foreign policy framework aligns with the conventional norm of central exclusivity; but in practice, the new dispensation of international trade relations permits SFGs in Nigeria to access the international scene.¹ In chapter five, the conventional norm of central exclusivity in foreign relations was appraised and found to be deficient in view of the changing dynamics of international relations.² In the context of international trade, it was argued that central exclusivity has become incompatible with the changing circumstances occurring globally.³ In that same chapter, cooperative federalism was appraised as an alternate model to central exclusivity for the management of international trade relations in federal systems.⁴ It was argued that cooperative federalism is better suited for effectively managing the new and existing stakeholders to the international trade process in federal systems under this new dispensation.⁵

In this chapter, the normative characteristics of cooperative federalism will be applied to Nigeria's international trade mechanism, so as to ascertain how feasible it is in practice. It will be argued in this chapter that for cooperative federalism to work in Nigeria's international trade regime, the constitutional provisions and key institutions which were found to be deficient in chapter four must be re-structured.

¹ See chapter four, section 4.7.

² See chapter five, section 5.3.3 – 5.3.4.

³ See chapter three, sections 3.3.1 – 3.3.3.

⁴ See chapter five, section 5.4.

⁵ See chapter five, section 5.4.5.

6.1.1 Justifying the Need for Reforms

Before proceeding to the suggestions for reform, it is pertinent at this point in the thesis to justify why it is necessary to depart from the conventional norm of central exclusivity in favour of cooperative federalism in Nigeria's international trade framework. In view of the arguments which have been proffered in chapter four of the thesis, the justification for reforms in Nigeria is hinged on the proposition that the extant framework is deficient in view of the changing dynamics of international trade. It was argued that the configuration of the extant international trade framework in Nigeria hinders her ability to utilise international trade as a platform for achieving development under this dispensation of international trade.⁶

To recap the key findings in chapter four, it was argued that Nigeria's international trade regime is not *flexible* because the constitutional and institutional provisions for international trade interactions are rigidly concentrated in the central tier of government.⁷

There is also no *coherence/predictability* in the extant framework because the inter-governmental linkage between the central government and the SFGs lacks consistency especially in regard to the distribution of functions for Nigeria's regional and multilateral trade engagements.⁸ It was argued that there is a lack of synergy between the policies of the FG and states in the FDI sector which has adversely affected the ease of doing business indicators in Nigeria.⁹ These inconsistencies in policy erode predictability in Nigeria's trade regime because it is difficult to foretell how the actions of states which are unconstitutionally recognised will impact on the trade process. It was also argued that the constitutional exclusion of SFGs from the mainstream of Nigeria's international trade interactions gives them the impetus to

⁶ See chapter four, section 4.7 and chapter five, section 5.3.3 for discussions on the lost potential within SFGs in Nigeria which occur as a result of a centralised system of trade relations. See also, section 6.3.1 *infra* for discussions on the importance of mainstreaming SFGs into Nigeria's international economic-development nexus.

⁷ See chapter four, section 4.7.1.

⁸ See chapter four, section 4.7.2.

⁹ See 'text to n 148' *infra* for discussions on how the inconsistencies between the FG and SFGs policies have affected the ease of doing business in Nigeria.

capitalise on any gaps available to access the international scene and achieve their economic development agenda.¹⁰

The existing framework also lacks *transparency* and *accountability* because in theory international trade is exclusively controlled by the central tier of government, but in practice SFGs are engaging in concurrent trade related activities which do not always align with the policy objectives of the FG. This creates confusion and lack of clarity for Nigeria's foreign trade partners. The Nigerian international trade regime now consists of multiple actors (states and non-state actors alike) which are not aligned under an integrated framework due to their non-recognition under the existing constitutional framework. As a result, it becomes difficult to apportion responsibility for an action which is not constitutionally catered for and delineated.

Finally, it is argued that the existing framework is not *inclusive* because it does not effectively combine the role of all the relevant stakeholders in Nigeria's international trade process. Inclusive is used in the context of integration. In this sense, the framework required for international trade interactions in the current global economic order is inclusive of both market forces and institutional regulators. However in Nigeria, the extant framework sidelines SFGs and emphasises only the linkage between the FG and the Organised Private Sector (OPS).¹¹

In view of the deficiencies identified above, two major issues emerge. First, the empirical evidence indicates that the opportunities created under the current dispensation are increasingly being exploited by SFGs in Nigeria.¹² Second, irrespective of the increased activities of SFGs on the international scene, they are still not recognised under the existing framework in Nigeria. As a consequence, it is

¹⁰ See chapter four, section 4.7.1.

¹¹ See chapter four, section 4.7 where an analysis of the policy implementation plan of the Nigerian Trade Policy Document (NTPD) of 2002 showed that SFGs are excluded from all the major areas of Nigeria's international trade interactions, except on the issue of land allocation.

¹² The empirical evidence considered in chapter four demonstrates that the activities of Nigerian SFGs in the international scene are on the increase.

argued that the activities of SFGs have the potential to negatively affect Nigeria's overall foreign policy objectives if not properly managed.¹³

The activities of SFGs in Nigeria's foreign interactions have already demonstrated the potential to create disguised restrictions and barriers to trade in the FDI sector. SFGs consider FDI a priority area because it is central to their development agenda.¹⁴ However, SFGs are constitutionally excluded from foreign relations and the control of their economic resources. Thus, they devise ways to circumvent these restrictions by propagating policies within the limited scope of powers available to them. In the process, their policy actions are not always aligned with that of the FG. For example, the Nigerian Land tenure system is controlled by SFGs.¹⁵ SFGs also have powers to levy taxes.¹⁶ These two subject matters have been utilised by SFGs with varied outcomes. For example, the US in a report from its Trade Representative Office (USTR) has complained about 'complex tax administration procedures, confusing land ownership laws...' amongst other issues which hinder investment in Nigeria.¹⁷

The activities of SFGs in Nigeria's international trade interactions are not all potentially adverse to her foreign policy and economic development. It is also argued that mainstreaming the role of SFGs into the framework of Nigeria's international trade process will be of immense benefit to Nigeria's international trade interactions. This is because under the new dispensation, a coordinated effort of all stakeholders (within and external to the nation-state) is important for achieving coherence in a complicated labyrinth of international trade interactions.¹⁸ Furthermore, in the new

¹³ Edward T Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (2004) 25(1) *Nw J Intl L & Bus* 1, 10.

¹⁴ See section 6.3.1 and 6.3.4 *infra* for discussions on the importance of SFGs to Nigeria's FDI drive.

¹⁵ Land Use Act 1978 Cap L5 LFN 2004. In the World Bank Report on Ease of Doing Business 2014, Nigeria is ranked 147 out of 189 countries in the world. On the specific topic of registering a property, Nigeria is ranked 185 out of 189.

¹⁶ SFGs are empowered to collect taxes by virtue of Item 7 and 8 of the Concurrent legislative List (CLL) of the 1999 Constitution.

¹⁷ USTR, 'Nigeria: Foreign Trade Barriers' 282. <http://www.ustr.gov/sites/default/files/Nigeria_0.pdf> accessed 5 November 2013.

¹⁸ Peter J Spiro, 'Globalisation and the (Foreign Affairs) Constitution' (2002) 63 *Ohio St LJ* 649, 668-69ff, 674-75.

dispensation of international trade relations (especially with the new regionalism), opportunities have opened up for SFGs to access the international trade scene through the FDI platform. This can be beneficial to Nigeria if SFGs are empowered to explore these channels to maximise their economic potential.

The caveat in these arguments is that mainstreaming SFGs into the framework for Nigeria's international trade interactions must be carefully thought through. This is because a departure from the conventional norm of central exclusivity in Nigeria's international trade interactions will only be justified if the alternative option proffered is feasible, in view of the political and economic peculiarities of the Nigerian federal system.¹⁹ This is because the dynamic nature of federalism does not present any universally acceptable method for effectively managing relations among the component units of a federal system. Thus, situating international trade relations within the federalism debate in Nigeria is not a solution in itself. Rather, the emphasis should be on fashioning a system which fits the peculiarities of the Nigerian state so as to achieve a pragmatic outcome.²⁰ Furthermore, the analysis in the previous chapter has shown that central exclusivity has some undeniable qualities which are crucial for the management of trade relations, irrespective of the current state of international trade. As such, it is only practical that any response to the changing dynamics of international trade must be tempered and realistic. This is the reason why a radical shift from central exclusivity to revisionist decentralisation is not advocated in this thesis. Certainty, accountability and uniformity which are crucial for the furtherance of international trade, cannot be sacrificed just because the system of international trade has evolved. Conversely, a rigid adherence to central exclusivity cannot be justified just because we have been used to doing things in a certain way. To find a balance, constitutionality must meet up with the expectations of present circumstances obtainable in the international trade system making cooperative federalism an attractive alternative. This is because it entails a nuanced rather than a radical shift in the constitutional parameters for the conduct of international trade in Nigeria.

¹⁹ See chapter five, section 5.1.

²⁰ RA Akindele and Oyeleye Oyediran, 'Federalism and Foreign Policy in Nigeria' (1985) 41 *Intl J* 600, 602.

6.2. Areas for Constitutional Reform.

The constitutional issues which need to be addressed to achieve cooperative federalism in Nigeria's international trade regime include:

1. The adoption of a cooperative approach to the interpretation of federal compliance clauses in international trade agreements; and
2. The strengthening of constitutional provisions which relate to intergovernmental linkage between the federal government (FG) and SFGs for Nigeria's international trade regime under the 1999 Constitution.

In view of the changing dynamics of international trade interactions in this dispensation of international trade relations, it will be argued that federal compliance clauses in international trade agreements can be interpreted to give effect to intergovernmental cooperation between levels of government on international trade negotiations, implementation and compliance.

In the context of Nigeria, it will be argued that the constitutional safeguard under s12 of the 1999 Constitution should be given a broader interpretation which is more inclusive of the participation of the SFGs in Nigeria's international trade output.²¹ It will also be argued that the scope of 'treaty' under s12 could be expanded to include 'all instruments' relating to international trade. The use of 'side door' and constitutional loopholes by SFGs should be discouraged by strengthening joint participation between levels of government. It will be suggested that this can be achieved by expanding the Concurrent Legislative List (CLL) of the 1999 Constitution to encompass more issues relating to trade; especially areas where SFGs have a comparative advantage and/or have already become active in practice.

6.2.1 The Need for a Re-Interpretation of Federal Compliance Clauses in International Trade Agreements.

In chapter two, it was identified that federal systems occupy a peculiar position in the operation of international norms.²² This is because the distribution of powers in a

²¹ See chapter four, section 4.7.1.

²² See chapter two, section 2.4 and 2.5. See also Shelly M Kierstead, 'An International Bind: Article XXIV: 12 of GATT and Canada' (1993) 25 (2) Ottawa L Rev 315, 317. See also, Hayes (n 13) 19.

federal system is dualised and the responsibility of overseeing foreign affairs is conventionally allocated to the central government.²³ As such, the general position in international law is that the central government in a federal system has a responsibility to ensure compliance from its regions and states with international obligations.²⁴ In chapter two, it was also identified that the GATT/WTO agreements and RTAs have federal compliance clauses. They stipulate that a contracting party to these international trade agreements is required to take necessary measures to ensure compliance by its regions with the international trade norms. Under the GATT/WTO system, this rule is established pursuant to art XXIV: 12.²⁵ RTAs such as NAFTA have similar provisions.²⁶ These clauses are also sometimes negotiated into international agreements by federal systems with the aim of limiting the scope of the central governments' responsibility for matters falling within the competence of the country's other levels of government.²⁷

In this section of the chapter, this issue of federal compliance clauses in federal systems will be revisited because the compliance mechanism for federal systems under the multilateral and regional trade systems determines the scope of the activities of Nigerian SFGs in this new dispensation of international trade relations.

More importantly, in chapter three it was identified that the new dispensation of international trade creates a 'contraction effect' which has disaggregated the nation-state and encourages the increased participation of SFGs in international trade.²⁸ It was also identified that these opportunities now presented to SFGs have the potential

²³ See generally, Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009).

²⁴ This obligation is entrenched in art 27 and 29 of the Vienna Convention on the Law of Treaties 1969, UN Doc A/CONF 39/27. See also, Hayes (n 22) 20.

²⁵ Similar provisions are found in other WTO agreements. See chapter two, section 2.4.2.

²⁶ See s 105 NAFTA. See also art 14, paragraph 4 of the European Free Trade Association (EFTA) (1960).

²⁷ See chapter two, section 2.4 for a detailed discussion on the types of federal compliance clauses in operation in international law. See also See Kierstead (n 22) 317ff, 321 - 323; Ivan Bernier, *International Legal Aspects of Federalism* (Longman 1973) 172-186.

²⁸ See chapter three, section 3.2.1. See also Emily Chiang, 'Think Locally, Act Globally? Dormant Federal Common Law Pre-emption of State and Local Activities Affecting Foreign Affairs' (2003) 53 *Syracuse L Rev* 923, 924-25; Spiro (2002) (n 18) 667-71.

to create trade barriers.²⁹ According to Hayes, ‘There is no question that non-conforming regional and local measures can significantly diminish the welfare gains sought through greater integration and liberalization of the world trade system.’³⁰ The emergence of trade barriers due to the activities of SFGs is a noticeable trend in the foreign investment line of cases discussed in chapter two.³¹ The prominent case of *Metaclad* demonstrates that trade liberalization in a federal system is susceptible to the uncertainties of non-conforming policies by SFGs.³² Also, as regional and local governments increasingly participate in world trade under this new dispensation of international trade, it is necessary to redress the ambiguities in the relationship between federal systems and the evolving international trade system.³³ In view of this reality, the implications of federal compliance clauses on the new dynamics of interactions in international trade necessitate an approach which will mitigate the potential fallouts and effectively ensure that the participation of SFGs is beneficial to the overall international trade process.

In the context of the case study, it is imperative to address the issue of federal compliance clauses in international trade agreements so as to ensure that SFGs in Nigeria are not acting in a manner which is inimical to Nigeria’s overall international trade objectives. Furthermore, in view of the thesis hypotheses which support the adoption of a cooperative approach to international trade interaction in Nigeria, it is important to assess how the interpretation of federal compliance clauses in federal systems can be aligned with a cooperative federalism model.

The analysis in chapter two ended with a description of the ambiguities which have characterised the interpretation of the federal compliance clause under international trade agreements.³⁴ The issue of sub-national compliance with GATT/WTO

²⁹ Hayes (n 24)10.

³⁰ *ibid* 31.

³¹ See chapter two, section 2.6.

³² See chapter three, section 3.4.4. See also, Mildred Warner and Jennifer Gerbasi, ‘Rescaling and Reforming the State under NAFTA: Implications for Sub-National Authority’ (2004) 28 (4) *Intl J Urban Regional* 858, 861.

³³ Hayes (n 30) 17.

³⁴ See chapter two, section 2.7.

obligations remains unclear despite the efforts at clarification made by the GATT/WTO Panels and the enactment of the Understanding on the Interpretation of art XXIV in the Uruguay Round.³⁵

The view in this thesis is that the federal compliance clause in international trade norms can be given an interpretation which is compatible with a cooperative federalism model. A cooperative federalism perspective is applicable to the interpretation of federal compliance clauses in international trade agreements if we proceed on a premise that the requirement for compliance with international trade norms in federal systems is not exhaustive on 'how' compliance should be achieved. For example, during the GATT years of the multilateral trade system, there were interpretations which suggested that the effect and scope of 'reasonable measures' under art XXIV: 12 was not intended to be compelling or mandatory for the contracting parties to the GATT.³⁶ One interpretation suggested by Jackson was that art XXIV: 12 did not apply to measures of SFGs which are constitutionally beyond the powers of the central government. As such, the central government was not in breach of its international obligations if an SFG in the exercise of such powers contravened an international obligation, as long as the central government did everything within its power to ensure local observance of GATT.³⁷ Another interpretation suggested by Jackson was to the effect that the provision of art XXIV: 12:

[W]as not intended to apply as a matter of law against local subdivisions at all, and even when the central government has legal power to require local observance of GATT it is not obligated under GATT to do so, but merely to take reasonable measures.³⁸

The panel decisions during the GATT years which centred on the interpretation of art XXIV: 12 did not fare better in clarifying the meaning of 'reasonable measures'. The

³⁵ Hayes (n 33) 17.

³⁶ See JH Jackson, 'The General Agreement on Tariffs and Trade in United States Domestic Law' (1967) 66 (2) Mich L Rev 249, 302.

³⁷ *ibid.*

³⁸ *ibid.*

decisions reached focused on a logical evaluation of the steps taken by the central government to secure compliance of its SFGs in each of the cases.³⁹ Hayes is of the view that there is no clear indication from this approach adopted by the GATT panels of the exact scope of reasonable measures. According to him, 'Other than the reference in *Canada-Import* to 'serious, persistent, and convincing effort' no GATT Panel has discussed what constitutes a 'reasonable measures' under art XXIV: 12.'⁴⁰ This thesis aligns with the view above because it demonstrates that 'reasonable measures' is open to any interpretation which promotes compliance, but the manner in which this compliance is achieved is debatable. For example, in the *Canada-Import case*, the Panel specified:

[T]hat in determining whether the actions of a country constituted reasonable measures, one should look to whether that country had made "serious, persistent, and convincing efforts" to ensure observance of the provisions of the General Agreement.⁴¹

It is argued that cooperation as a means of ensuring compliance with international trade norms fulfills these requirements stipulated in the decision above. This is because cooperation is a proactive measure which ensures that SFGs are mainstreamed into the formulation and negotiation of trade policy at the outset, rather than a reactive system which responds only when SFGs have acted contrary to policies negotiated without their input.

The introduction of the Understanding on the Interpretation of art XXIV of the General Agreement on Tariffs and Trade (GATT) 1994 has brought more clarity to the scope of the section. However, Hayes is of the view that while it (the Uruguay Understanding) may have 'clarified the responsibility of all GATT/WTO federal nation/states for the non-conforming behaviour of their component units under the GATT/WTO,'⁴² 'it leaves open the question of what constitutes "reasonable

³⁹ See chapter two, section 2.2.4 for a discussion of the key cases which have been decided by the GATT/WTO Panels on the effect of art XXIV: 12 on federal systems.

⁴⁰ Hayes (n 35) 30.

⁴¹ *Canada-Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies DS17/R-39S/27 (October 16, 1991)*.

⁴² Hayes (n 40) 25.

measures" to seek compliance.⁴³ Furthermore, Hayes points out that 'There is no customary international law rule regarding what measure(s), if any, central governments must take to seek compliance at the local level.'⁴⁴ As such, the requirement of '*taking necessary measures*' which from the GATT/WTO jurisprudence considered in chapter two is not definitive can be interpreted as a requirement that contracting parties should strengthen the participation and linkage between all the relevant stakeholders, including their SFGs, so as to ensure compliance with the international trade agreements.

In view of the broad scope of international economic relations in this current dispensation, it is argued that there is no legal basis for interpreting the 'reasonable measures' in the context of central governments being expected to compel their regions; neither should it be taken as a basis for the central government to approach non-compliance by their regions in a lax manner. Instead, the emphasis should shift from an interpretation which focuses on '*must comply*' to an interpretation which focuses on '*how to effectively comply*.' As such, a cooperative interpretation promotes compliance by emphasising the need for integration, flexibility and accountability among all stakeholders (old and new) to the process of international economic relations.⁴⁵

The next question to be addressed is how would a cooperation mechanism for federal compliance with international trade norms be achieved? There is a suggestion by Hayes that federal systems may have become resolved to adopting an 'efficient breach' approach for resolving the issue of compliance of their SFGs. This is a:

[s]ituation where the federal state is forced to accept the penalties associated with violation of its international agreement because it has *no legitimate reasonable or necessary measures available* (emphasis added) to ensure observance of the agreement at the local level.⁴⁶

⁴³ *ibid.*

⁴⁴ *ibid* 20.

⁴⁵ Bernier (n 27) 192ff, 196-202.

⁴⁶ Hayes (n 44) 33.

Hayes is also not optimistic about the effectiveness of this approach in the broader context of its impact on the greater purpose of trade liberalization. He argues that this approach is sensible for some federal systems, but it leads to a situation where ‘negatively affected Members are forced to devote resources to addressing non-conforming measures in the WTO dispute settlement process.’⁴⁷

The ‘efficient breach’ approach represents a ‘defeatist attitude’ whereby a federal system seeks to use monetary compensation to offset its inability or unwillingness to obtain compliance amongst its component units. More so considering that compensation is just a temporal remedy under the GATT/WTO law; it is absurd that a federal state would be looking to use an efficient breach approach to discourage nonconformist policies by its SFGs.⁴⁸ It is argued in this thesis that cooperation falls within the parameters of ‘*legitimate reasonable or necessary measures available*’ to a federal system to achieve compliance of its SFGs with international trade norms. Integrating all stakeholders into the trade process is a legitimate action which can minimize nonconformist actions of SFGs. The advantages of a vibrant intergovernmental linkage in the current dispensation of international economic relations include an increased sense of belonging from SFGs by being active participants in the federal system’s international trade policy output. Also, active participation from the SFGs can yield better commitment to implementation of policies.⁴⁹

Hayes also suggests an ‘inside-out’ approach to interpreting federal compliance clauses in international trade agreements. This approach maintains the current language of art XXIV: 12 while re-engaging and re-energizing regional and local governments in the trade process at the domestic level.⁵⁰ According to him, ‘The main goal of this approach is to decrease the potential for regional and local

⁴⁷ *ibid* 33.

⁴⁸ Compensation is a temporal remedy under the DSU. See Article 22.2 DSU; it was also raised in para 4.82 of the Canada-Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies DS17/R-39S/27 (October 16, 1991) and para 62 65, 70 and 72 of Canada-Measures Affecting the Sale of Gold Coins. See also Mitsuo Matsushita and others, *The World Trade Organisation: Law, Practice, and Policy* (2nd edn, OUP 2006) 119 - 120

⁴⁹ Stéphane Paquin, ‘Federalism and Compliance with International Agreements: Belgium and Canada Compared’ (2010) 5 *Hague J Dip* 173.

⁵⁰ *ibid* 33-34.

nonconforming measures through greater domestic education, participation and administration in the international trade system.’⁵¹ This represents a cooperative approach to managing the issue of compliance with international agreements within a federal system. Based on this approach, Hayes identifies areas where there could be direct and indirect involvement between central governments and SFGs in regard to the international trade process.⁵² This includes ‘(1) increased input into trade negotiations, (2) increased involvement in the development of implementing legislation; and (3) a larger role in the administration of trade disciplines implicating regional and local measures.’⁵³ There are examples of these cooperative mechanisms in federal systems such as the US (to a limited extent), Canada, India and Belgium which fit the description of the ‘inside-out’ approach analysed by Hayes.

For example, Hayes categorises the US model under the ‘inside out’ approach albeit a very informal model.⁵⁴ Traditionally, the nature of US constitutional law makes the application of GATT law in the US automatic; dependent upon a proclamation by the President acting on his constitutional powers in this regard or pursuant to Congressional authorisation to negotiate, enter into and accept an international agreement on behalf of the US.⁵⁵ As a consequence, GATT law is superior to state law in the US.⁵⁶ Interestingly, even though there are no major constitutional impediments against the enforceability of GATT law in the US, there is growing emphasis on a ‘*how to effectively comply*’ rather than a ‘*must comply*’ attitude towards federal compliance clauses. This is noticeable in the evolving domestic regulatory framework for state education and participation in international trade. One such regulatory mechanism is the Intergovernmental Policy Advisory Committee

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ Hayes (n 47) 34-35.

⁵⁵ See Shelly M Kiersteaad, (n 27) 317-319. See also JH Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press 1989) 62-63.

⁵⁶ See Kiersteaad (n 56) 320. Cf: Jackson (1967) (n 38) 292-97; Ronald A Brand, ‘The Status of the General Agreement on Tariffs and Trade in United States Domestic Law’ (1990) 26 *Stan J Intl L* 479, 489-93.

(IGPAC).⁵⁷ In addition to the IGPAC, there is the National Conference of State Legislatures (NCSL) which represents the collective interests of all fifty states.⁵⁸ Also, legislation such as the Statement of Administrative Action for the Uruguay Round Trade Agreements (SAA) establishes a procedure for federal/state consultations.⁵⁹ However, this framework in the US is relatively weak when compared to the Canadian and Belgian examples discussed in chapter five.⁶⁰ Although the US model is solely advisory without any force of law, it is arguable that since the emergence of these cooperative linkages is not due to difficulties faced by the US FG in achieving compliance of state law with international trade norms, therefore these mechanisms have been encouraged in the US because it has become imperative to accommodate the growing importance of SFGs in the international trade process.⁶¹

In Canada, the existence of a similar cooperative mechanism is found in the network of C-Trade Committees which have evolved in provincial/central government interactions on international trade negotiations since the Kennedy Rounds of GATT negotiations.⁶² The Canadian experience is different from that of the US because of the uncertainties surrounding the delineation of the powers of the central government and the provinces in relation to foreign affairs.⁶³ As a consequence, the evolution of a

⁵⁷ The IGPAC was created pursuant to the 1974 Trade Act. It consists of approximately thirty-five members representing the states and various other non-federal entities. 'The IGPAC works directly with the Office of the United States Trade Representative (USTR) to provide overall policy advice on trade policy matters that have a significant relationship on the affairs of state and local governments within the jurisdiction of the United States.' See s 135 (e) of the Trade Act of 1974 and s 2104 (e) of the Trade Act of 2002.

⁵⁸ 'The NCSL is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths and territories. NCSL provides research, technical assistance and opportunities for policymakers to exchange ideas on the most pressing state issues.' The NCSL has sought to work closely with USTR and Congress to ensure that these concerns are taken into account in recent trade and investment agreements and their implementing legislation. See NCSL Website <<http://www.ncsl.org/about-us.aspx>> accessed 03 June 2014.

⁵⁹ Statement of Administrative Action for the Uruguay Round Trade Agreements, tit I, § 101 HR Doc No 103-316 103rd Cong (2nd Sess 1994) [hereinafter SAA].

⁶⁰ Schütze (n 23) 122. See chapter five, section 5.4.

⁶¹ Kierstead (n 57) 320.

⁶² The evolution of the consultative framework for international trade negotiations in Canada has been discussed in Chapter Five, section 5.4.1.

⁶³ *ibid.*

cooperative mechanism to accommodate competing views of SFGs in Canada has been inevitable. Canada has been at the centre of all the disputes which have arisen in the GATT/WTO jurisprudence over the interpretation of art XXIV: 12. This is because the nature of the federal system in Canada makes it most prone to nonconforming policies by its provinces. The usefulness of the Canadian experience in this thesis is that it demonstrates the practicability of cooperative federalism as a framework for ensuring the effective compliance of SFGs with international trade norms. Although the GATT/WTO cases show the acrimonious side of this process, there are a good number of success stories which have emerged from the Canadian model of cooperation in international trade relations.

In India, there has been a limited expression of such direct deliberate consultative linkage mechanisms which provide for cooperation to ensure compliance with international trade norms. The interesting fact about the Indian experience is that intergovernmental linkage on international trade has emerged indirectly due to the evolving process of federalism in India.⁶⁴ Intergovernmental linkage on international trade compliance in India has been characterized by the regions exerting political pressure on the central government to force cooperation on issues of international trade.⁶⁵ The Indian experience is useful to the issue of federal compliance clauses because it demonstrates that in the absence of affirmative action, cooperation can still emerge in a federal system due to the indirect political pressure exerted by SFGs as a consequence of their growing influence on the international trade process. It demonstrates that when preemptive steps are not taken to engage the cooperation of SFGs, the dynamics of the current dispensation of international relations will inevitably force the issue.⁶⁶

⁶⁴ See chapter five, section 5.3.3. see also Amitbah Mattoo and Happymon Jacob, *Foreign Relations in India: A Growing State Role* in Hans Michelmann (ed), *A Global Dialogue on Federalism: Foreign Relations in Federal Countries*, Vol 5 (McGill-Queen's University Press 2006) 27.

⁶⁵ See K Sridharan, 'Federalism and Foreign Relations: The Nascent Role of the Indian States' (2003) 27 (4) *Asian Stud Rev* 463, 477. Cf: Jenkins who criticises the overestimation placed by Sridharan on the emerging role of Indian regions in foreign policy. Ron Jenkins, 'How Federalism Influences India's Domestic Politics of WTO Engagement (and is itself Affected in the Process)' (2003) 43 (4) *Asian Surv* 598, 615- 617.

⁶⁶ Mattoo and Jacob (n 65) 27-29. See also chapter two, section 2.2.1-2.2.2 which addresses the importance of the evolving federal process in the changing constitutional and institutional dynamics of international economic interactions.

Belgium represents the most advanced (in terms of formality) and inventive solution to the issue of compliance with international trade norms. Compliance with international trade norms in Belgium is a product of joint participation by the central government and regional governments. The regions have the role of co-decision and intergovernmental mechanisms are highly institutionalized.⁶⁷ Under this formally institutionalized linkage mechanism, Belgium's compliance with international trade agreements is negotiated by all stakeholders and any decision reached is deemed to be the common position of the Belgian state.⁶⁸ The usefulness of the Belgian experience to this thesis is that it demonstrates the possibility of sustaining a formal framework for cooperation between the central and SFGs in regard to international trade.⁶⁹ Although there is no guarantee that this system can be replicated in other federal systems, it supports the thesis argument that a cooperative approach to achieving compliance from SFGs with international trade norms is feasible.

A cooperative perspective on the interpretation of the federal compliance clause in international trade agreements is not without its challenges. For example in the US, federal-state trade policy consultations have been criticized for being 'really nothing more than window dressing, with serious consultations rarely occurring.'⁷⁰ Hayes commenting on the US experience points out that during the negotiations for the US-Australia Free Trade Agreement, the IGPAC submitted a report in 2004 which expressed amongst other things its dissatisfaction with the method of obtaining state support in areas within their constitutional authority. According to the report, 'Statutes and regulations that states and local governments have validly adopted, that are constitutional, and that reflect locally appropriate responses to the needs of our residents, should not be overridden by provisions in trade agreements.'⁷¹

⁶⁷ Paquin (n 48) 177.

⁶⁸ *ibid* 184-187.

⁶⁹ *ibid* 196.

⁷⁰ Hayes (n 55) 34.

⁷¹ 'The US-Australia Free Trade Agreement (FTA) Report of the Intergovernmental Policy Advisory Committee' (IGPAC Report 2004), (March 12, 2004) 2 <http://www.ustr.gov/archive/assets/Trade_Agreements/Bilateral/Australia_FTA/Reports/asset_upload_file482_3384.pdf> accessed 03 June 2014.

In response to the concerns raised by the IGPAC, Congress included a ‘no greater rights’ language when renewing the Trade Promotion Authority legislation of 2002.⁷² The effect of the ‘no greater rights’ provision was to ensure that trade agreements signed by the FG do not give foreign investors more rights and protection than those granted to US citizens.⁷³

‘The IGPAC has called for a fully funded, regularly scheduled mechanism for US federal-state trade policy consultations in light of the increasing state role in trade policy formulation, negotiation and dispute resolution.’⁷⁴ By accommodating the influence of SFGs on the process which informs the position of the nation-state in international trade negotiation, these actors are privy to the agreements reached. As a consequence, they are less likely to resort to nonconformist action.⁷⁵ This is as against a position of exclusion, where the nation-state seeks to force a position negotiated in isolation of the input of the SFGs.

In Canada, the challenges which have confronted the intergovernmental linkage for international trade are similar to that of the US. For example, the contribution of the provinces in Canada is also informal, flexible and limited in its scope.⁷⁶ Fafard and Leblond point out that during the negotiations for the Canada–United States Free Trade Agreement (CUFTA) and NAFTA, provincial governments were never formally part of the negotiations and their contribution was restricted to provision of information and analyses of the impact of various possible elements of the agreements.⁷⁷ According to Fafard and Leblond:

⁷² IGPAC Report 2004 (n 72). See also minutes of the meeting of the The National Conference of State Legislatures (NCSL) Standing Committee on Economic Development, Trade & Cultural Affairs, August 17, 2005 <<http://www.leg.wa.gov/JointCommittees/SCTF/Documents/PresidentialTradePromotionAuthority.pdf>> accessed 16 September 2013. See also <<http://www.citizen.org/documents/uscm%20resolution.pdf>> accessed 16 September 2013.

⁷³ The National Conference of State Legislatures (NCSL) (n 73)

⁷⁴ Hayes (n 71) 35.

⁷⁵ Paquin (n 70) 196.

⁷⁶ *ibid* 176.

⁷⁷ Patrick Fafard and Patrick Leblond, ‘Twenty-First Century Trade Agreements: Challenges for Canadian Federalism’ (2012) *The Federal Idea* 6 <<http://ideefederale.ca/documents/challenges.pdf>> accessed 4 April 2014.

Even when the NAFTA negotiations moved more squarely into areas of provincial jurisdiction, because of the labour and environment side deals, provinces were consulted but there was no requirement for all them to agree. In fact, only three provinces (Quebec, Alberta, and Manitoba) formally signed onto both of them. Moreover, the significance of their formally adhering to the side agreements is unclear and may amount to nothing more than a *political commitment* (emphasis added) to be bound by the terms of the agreement, a commitment that may or may not be used by the Government of Canada at some future date (Kukucha 2008).⁷⁸

This view above focuses on the weight which is attached to the contribution of SFGs as a basis for discountenancing their importance. It was argued in chapter five that the contribution of the provinces in Canada's international trade interaction under the Canadian intergovernmental linkage is couched in the form of a flexible soft law mechanism.⁷⁹ In view of the federal compliance clause, it is argued that this perceived weakness by Fafard and Leblond is actually beneficial for achieving certainty and finality in the international trade process. If the central government is not obligated to implement the views of the provinces, then it will not be encumbered with an unending process of prolonged trade negotiations and contradictions which hinder its ability to negotiate and comply with international trade agreements. In essence, flexibility in the process preserves a key component of central exclusivity which is the ability of the nation-state to act decisively. At the same time, the competing interests from the provinces are still taken into consideration and are of invaluable benefit where necessary. Fafard and Leblond's view underestimates the power of a 'political commitment' which is achieved through these intergovernmental linkages. This view is supported in this thesis because it demonstrates a practical reality of the federal process. The fact that 'political commitments' are now required to achieve compliance with international trade agreements in Canada shows that cooperation is necessary and has been elevated in priority under the new dispensation of international trade relations.

⁷⁸ *ibid.*

⁷⁹ Paquin (n 77) 176.

In India, the challenges facing the intergovernmental linkage between the regions and the central government stem from a tense relationship between the two levels of government. In the US, Canada and Belgium there is a **relatively cordial relationship** between both levels of government. In India, the situation is more confrontational with the regions increasingly exerting pressure on the central government. The resultant intergovernmental linkages which have emerged are presumably a response to the pressure being exerted by the regional governments.⁸⁰ Irrespective of the circumstances which have given birth to cooperation in India, it is clear that cooperation is now an indispensable requirement of international interactions. It is an outcome which cannot be escaped even if the central government is averse to it.

In Belgium where the process is very formal, the main challenge facing the intergovernmental mechanism for cooperation is the language and cultural fragmentation of the Belgian state. This makes decision-making factional and highly politicised.⁸¹ This is however not surprising as federalism is premised on a pragmatic process of balancing component units which are inherently diverse.

The crucial points which can be gleaned from the country examples mentioned above include:

1. Intergovernmental linkage for international trade interactions is an option which could take the form of direct deliberate action which is a response to the necessity for closer links between all stakeholders in the trade process. This describes the Canadian experience and to some extent the US experience.
2. It could also arise as an indirect consequence of the political pressure exerted by the expanding influence of SFGs in the international trade process. This fits the description of the Indian experience.
3. Intergovernmental linkage could be informal and flexible as is the case in the US and Canada; or

⁸⁰ See generally Jenkins (n 66).

⁸¹ See generally Kris Deschouwer and Min Reuchamps, 'The Belgian Federation at a Crossroad' (2013) 23 (3) Reg & Fed Stud 261; Johanne Poirier, 'Formal Mechanisms of Intergovernmental Relations in Belgium' (2002) 12 (3) Reg & Fed Stud 24, 25.

4. It could be formalised as is the case in Belgium.

From the examples discussed above it can also be argued that a cooperative response to the issue of compliance with international trade agreements in federal systems can take the form of:

1. A legislative response to a constitutional deficiency (e.g., Section 102(b) of the Statement of Administrative Action for the Uruguay Round Trade Agreements (SAA) in the US or the Special Act of 5 May 1993 in Belgium);
2. An institutional response to a constitutional deficiency (e.g., the IGPAC and NCSL in the US, C-Trade Committees in Canada, and the intergovernmental cooperation Committees in Belgium); or
3. A political response to a constitutional deficiency (e.g., the use of political pressure by the regions in India).

Nigeria is the least developed of all the federal systems cited above. From a constitutional perspective, intergovernmental linkage in Nigeria as a response to federal compliance clauses in international trade agreements is underdeveloped because of the divergence between constitutional theory and reality in Nigeria's international trade regime. The position in Nigeria is dictated by the 'centralised stance' of the federal system in place. The constitutional provisions on international trade relations provide for a limited role of SFGs in international trade interactions, hence intergovernmental linkage in the international trade process is minimal.

It was identified in chapter four that the Nigerian 1999 Constitution is dualised in nature, with foreign relations situated in the Exclusive Legislative List (ELL) as the exclusive domain of the Federal Government (FG). To achieve an effective intergovernmental linkage between the different levels of government in Nigeria on international trade, the 1999 Constitution must be revised to reflect the changing role of states in Nigeria's international trade interactions.

More specifically, it is argued that an amendment in the area of international trade relations which is vital to the economic development aspirations of all stakeholders to the Nigerian federalism will be appropriate. This is because it can achieve concurrent objectives of bringing consistency to Nigeria's international trade regime and in the same vein, stem the tide of violent self-determination claims from sections of the country.

It was argued in chapter four that the international trade framework in Nigeria is not coherent because there are inconsistencies in the constitutional provisions for the distribution of powers between the FG and SFGs.⁸² These inconsistencies will now be re-visited with the aim of suggesting solutions (from a cooperative federalism perspective) to ensure effective compliance with international trade agreements by SFGs in Nigeria.

6.2.3 Correction of the Mirage of ‘Safeguards’ for SFGs under s12 of the 1999 Constitution.

The reliance on ‘safeguard mechanisms’ in federal constitutions is a disadvantage of the conventional norm of central exclusivity which was identified in chapter five. It was argued that relying on built-in constitutional safeguards as a basis for justifying centralisation of international trade relations is no longer safe in this era of interconnected transnational issues affecting trade.⁸³

In chapter four, the existence of a safeguard in the Nigerian 1999 constitution was established.⁸⁴ The safeguard is found in s12, which provides that:

(1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.

(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

*(3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.*⁸⁵

⁸² See chapter four, section 4.7.

⁸³ See chapter five, section 5.3.3.

⁸⁴ S 12 1999 Constitution.

⁸⁵ *ibid* s12 (3).

A key issue arising from the interpretation of s 12 is whether a treaty which relates to a matter under s 12 (1) and by inference the ELL is also subject to ratification by a majority of the state house of assemblies under s 12 (3). Based on the presumption in favour of plenary powers for the FG in foreign relations and the combined effect of s.12 (1), (2) and Item 31 of the ELL, a logical interpretation is that only matters which do not fall under the ELL come under the purview of s12 (3). In effect, SFGs in Nigeria only have an input in the ratification of international treaties which fall outside the ELL. Also, because the National Assembly (NA) is made up of state representatives, so presumably their interests are considered to be catered for under s12 (1) through the NA.⁸⁶ The provisions of s12 (2) support this argument by providing that '*The National Assembly may make laws for the Federation or any part thereof...*' This means the NA is empowered to act on behalf of SFGs by passing legislation to ratify a treaty falling under both the ELL and CLL. With such sweeping powers it can only be assumed that the additional provision in s12 (3) is meant to act as an added layer of protection for SFGs. However, this layer of protection in s12 (3) is very restrictive and it is not surprising that this provision has not been utilised by SFGs in Nigeria till now.

It was also pointed out that this narrow scope of the safeguard provision in s12 does not help in achieving compliance with international trade norms in Nigeria. The reason is that although in theory the interpretation of these sections creates a presumption in favour of sweeping pre-emptive powers for the FG, in practice the narrow scope of s12 does not take cognisance of the emergence of jurisdictional grey areas due to the ever expanding scope of international trade. As a consequence, when SFGs are faced with issues which do not fall under their jurisdiction but are relevant to their development objectives, they fashion ingenious ways to circumvent the constitutional provisions. When SFGs are forced to take this course, the chances of nonconformist policies will emerge and it will be more difficult for the FG to achieve compliance with international trade norms.

It is suggested that the reference to 'treaty' under s 12 should be given a broader interpretation which encompasses a wider scope of instruments now utilised in

⁸⁶ Akindele and Oyediran (n 20) 610-611ff, 614; Ibrahim A Gambari, 'Federalism and the Management of External Relations in Nigeria: Lessons from the Past and Challenges for the Future' (1990) 21(4) Publius 113, 117.

international trade interactions, whether they are conventionally recognised under international law or not. The need for a broader interpretation of ‘treaty’ under s 12 is borne out of the belief that the scope of what constitutes a treaty in international law has evolved significantly from the conventional interpretations which focus on nation-state centred practice in international law. For example, under the Vienna Convention on the Law of Treaties, a ‘treaty’ for the purposes of the Convention ‘means an *international agreement concluded between states* in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’.⁸⁷ Whereas, under the Belgian federal system of shared competence in foreign relations, the Flemish Department of Foreign Affairs defines a treaty as ‘*Every written agreement, concluded between two or more entities or persons who have international legal personality, in order to bring about legal effects, and that is governed by international law or international public law.*’⁸⁸ The latter definition of a treaty is reflective of the broader scope of what should be taken into consideration in the current dispensation of international relations. Rather than focus on just ‘international agreements concluded between states’, the scope of the Flemish definition of treaty covers ‘every written agreement’ entered into by ‘entities.’ As such, the latter definition captures changing forms of agreements which have legal effect in international law or public international law, even though they may not necessarily meet the narrow stipulation under the Vienna Convention on the Law of Treaties.

As was pointed out in chapter five, an argument against adhering to central exclusivity as a basis for the conduct of international trade relations is that central exclusivity does not give enough opportunity for variations in the conceptualisation of foreign relations.⁸⁹ It was argued that the conventional mechanism of international law seeks to protect the continuation of nation-state practice by denying recognition to arrangements entered into by an SFG, even though these arrangements are trans-

⁸⁷ See art 29 Vienna Convention (n 24) Emphasis added.

⁸⁸ Flemish Department of Foreign Affairs <<http://www.vlaanderen.be/int/en/flanders-international-treaty-competence>> accessed 03 June 2014.

⁸⁹ See chapter five, section 5.3.3.

boundary in nature. This does not reflect the reality that these arrangements have a bearing on international relations irrespective of the perceived illegitimacy of the actors involved or the form utilised. This is applicable in Nigeria because s12 only relates to treaties in a limited sense envisaged under the Vienna Convention and considers other instruments as irrelevant under international law.

In this thesis, two potential reforms are suggested which could make s12 of the 1999 Constitution more accommodating of the input of Nigeria's SFGs.

First, a broader interpretation of 'treaty' can be given under s12. The potential benefits would include a wider scope for cooperation between the FG and SFGs on international trade. It would also provide a better chance of achieving compliance with international trade agreements. Relying on Haye's typology,⁹⁰ a broader interpretation of s12 would open up an avenue for SFGs to:

1. Increase their input into trade negotiations:- this is because a broad scope of s12 which covers the implementation of 'all trade instruments' would mean that SFGs are factored into the negotiation process of all trade instruments signed or initiated either by the FG or themselves.
2. Increase their involvement in the development of implementing legislation: - if SFGs play a more active role in the development process of legislation for ratifying treaties in Nigeria they will be less likely to resort to nonconformist policies.
3. Play a larger role in the administration of the trade disciplines affecting regional and local measures: - if SFGs are given greater responsibilities under the enabling laws to administer trade disciplines which touch on areas that relate to their areas of comparative advantage or development interest, the chances of effective implementation will be higher. A good example of this is found in the port concessioning in the coastal states such as Lagos, Delta and Akwa Ibom. Lagos and Akwa Ibom have already demonstrated their ability to drive the port concessioning process over and above the federal government, even though port concessioning is under the ELL.

⁹⁰ Hayes (n 75)

The second approach recommended in this thesis to ensure effective compliance with international economic norms in Nigeria, is to infuse a cooperative federalism perspective into the restrictive provision of s12 of the 1999 constitution. Relying on parallels from the country examples which were discussed in previous section of the chapter, s12 of the 1999 Constitution can be repositioned through constitutional reforms to promote joint participation between the FG and SFGs. This can be achieved by adopting a legislative reform which aligns with the ‘inside-out approach’ advocated by Hayes.

Drawing on parallels from the models of intergovernmental linkage which have developed in federal systems such as Canada and Belgium as a response to the changing nature of international economic relations, a proposed alternate wording for s12 is:

12. (1) No treaty⁹¹ between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.

(2) There shall be consultations between the National Assembly and any State(s) affected by a treaty for the purpose of achieving conformity of State laws and practices with said treaty before it enters into force in the Federation pursuant to (1)⁹²

(3) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

(4) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (3) of this section shall not come into force

⁹¹ ‘Treaty’ is given a broader interpretation in line with the changing scope of international economic interactions in the current dispensation of international economic relations.

⁹² In subsequent analysis in section 6.3.2 and 6.3.5 of this chapter, the reference to a ‘**consultation process**’ in this proposed sub-section will be linked to an institutional recommendation for a re-strategised NCC and ENFP. These institutional changes which will be discussed later will serve as a forum for actualising the process of cooperation envisaged in this section.

*unless reasonable opportunity has been made for any interested and/or affected State(s) to contribute to the content of the bill.*⁹³

These proposed amendments suggested above would be ineffectual in the absence of attendant institutional changes being made in Nigeria's international economic relations regime. The institutional changes required to breathe life into this alternative wording for s 12 of the 1999 Constitution will be considered subsequently in section 6.3 of this chapter. Before moving on to institutional issues, the constitutional issue of 'side-doors' used by SFGs will be addressed in the next section of the chapter.

6.2.4 Discouraging the Use of 'Side-Doors' being exploited by SFGs to Circumvent the Constraints of the 1999 Constitution.

Another point which was identified in chapter four is the jurisdictional grey areas of the constitution which have been exposed under this dispensation of international economic relations.

It was argued that the 1999 Constitution constitutes a problem because it is unable to restrain SFGs from expressing themselves on the international scene. While the key provisions of the constitution as pointed out earlier give the FG total dominance in international economic interactions, the exigencies of the current dispensation of international economic relations has exposed cracks and loopholes which are progressively being exploited by SFGs. The introduction of Mandarin into the educational curriculum for Lagos state is a case in point which was addressed in chapter four. The origin of this issue was traced to the constitutional provision of - Item 18 and 30 of the CLL. It was identified that these side doors are a reoccurring reminder of previous constitutional eras in Nigeria.⁹⁴

The position in this thesis is that the use of side-doors should be discouraged by the FG because it has the potential to breed nonconformist policies which affect Nigeria's compliance with international economic agreements. Although the

⁹³ It is envisaged that 'reasonable opportunity' and the scope of 'contribution to content' would need to be clearly defined within the terms of reference for the 'consultation process' which will be discussed infra in section 6.3 of this chapter.

⁹⁴ See chapter four, section 4.7.1. See also Akindele and Oyediran (n 87).

empirical evidence of Nigeria's SFGs on the international scene are yet to cause any major upheaval, it is wise to nip such possibilities in the bud by utilising deliberate policies which integrate these activities into the mainstream of Nigeria's international economic policy framework.

In order to attain coherence and cooperation between the FG and SFGs on matters of international economic relations, the CLL should encompass more matters relating to trade and investment which are of interest to SFGs. This would not erode the FG's advantage stemming from the constitutional supremacy clause to pre-empt the policies of SFGs when necessary. With a stronger CLL on matters pertaining to international economic relations, SFGs would be able to express themselves legitimately as co-participants with the FG and as a consequence would not need to resort to side-doors.

It is argued that a combination of the proposals suggested above i.e. giving a broader interpretation to 'treaty' under s12 of the 1999 Constitution and/or reforming the constitutional provision and strengthening the CLL can discourage the use of side-doors because the constitutional provisions would be repositioned to foster direct and indirect cooperation between levels of government on matters of international economic relations. This argument is supported by the useful parallels which were gleaned from the constitutional reforms made to facilitate the functioning of cooperative federalism in federal systems such as Belgium, Argentina and Austria.⁹⁵

To consolidate these reforms, the institutional provisions of Nigeria's international economic relations must also be addressed in line with a cooperative federalism model. The institutional provisions which need to be restructured will be considered in the next section.

6.3 Areas for Institutional Reform.

In this section the role of SFGs in the trade –development nexus will be discussed. Suggested reforms to specific political institutions such as the National Assembly (NA), the National Council on Commerce (NCC) and the Nigerian Governor's Forum (NGF) will be examined.

⁹⁵ See chapter five, section 5.4.2.

6.3.1 Linking Trade and Development: The Need for SFGs for institutional Coherence.

International trade is important in the economic growth and development of countries in the international system. Briggs, supports this view stating that ‘The empirical evidence of the economic prosperity of many successful economies today has been mainly driven by the volume of trade, interpreted as the volume of exports traded and the level of export competitiveness.’⁹⁶ However, there are arguments for and against the best means of actualising development through international trade. For example, trade liberalisation has been the centre piece of international economic relations in the past 50 years, however, it is not settled amongst scholars that trade liberalisation is actually beneficial for development.⁹⁷ Dollar and Kraay argue that there is a certain consensus about the belief that openness to international trade accelerates development.⁹⁸ However, there is a contrary view that in practice trade liberalisation does not necessarily stimulate development because rich countries and large corporations dominate the global marketplace and create very unequal relations of power and information.⁹⁹ The UNCTAD Report of 2005 presents a pragmatic perspective to the debate stating that:

In the context of growing interdependence among nations in today’s globalizing world economy, trade and development are becoming increasingly interrelated. The contribution of trade to development depends greatly on the context in which it works and the ends it serves. To act as a genuine engine of development, trade must lead to steady

⁹⁶ Inye Nathan Briggs, Nigeria: Mainstreaming Trade Policy into National Development’ (2007) African Trade Policy Centre (ATPC) Work in Progress No 52 3 <<http://www.uneca.org/sites/default/files/publications/52.pdf>> accessed 10 September 2010. See also The World Bank, *Trade Liberalization: Why So Much Controversy?* in *Economic Growth in the 1990s: Learning from a Decade of Reform* (World Bank Publications 2005).

⁹⁷ Briggs (n 96) 2.

⁹⁸ See David Dollar and Aart Kraay, ‘Trade, Growth and Poverty’ (2004) 114(2) *Econ J* 22, 47.

⁹⁹ See Global Policy Forum (GPF), <<http://www.globalpolicy.org/social-and-economic-policy/international-trade-and-development-1-57.html>> accessed 10 October 2013.

improvements in human conditions by expanding the range of people's choices.¹⁰⁰

Irrespective of these uncertainties surrounding the value of international trade in development, it is evident from the views discussed above that linking international trade to a development strategy is a sensible course to take for developing countries like Nigeria. More importantly, linking international trade to a development strategy is especially important to Nigeria in a globalised era of international economic relations where the welfare gains of trade are more accessible for her economic growth and development objectives.

In view of the expanding nature of the international economic system, utilising trade as a platform for development requires institutional coherence. Mashayekhi and others support this view stating that 'effectively managing the interface between regional and multilateral initiatives requires *greater synergy* between national development objectives and external commitments.'¹⁰¹ In effect, every trading nation must align its external commitments in an ever evolving international economic system with its internal development strategy. However, this is not an easy task. For example, Nigeria has been faced with competing considerations in the crude oil sector – her major foreign exchange earner - which has negatively influenced her trade and development strategy. The competing considerations in this sector include, Nigeria's desire to maximise her leverage in the world crude oil production by joining the Organization of the Petroleum Exporting Countries (OPEC) cartel, while attempting to balance her commitments to liberalise trade under the multilateral framework of the GATT/WTO and bilateral Joint Venture Agreements with Multinational Oil Corporations (MOCs).¹⁰² The FG in a bid to keep these external

¹⁰⁰ UNCTAD, *Developing Countries in International Trade 2005: Trade and Development Index* (United Nations Publications 2005) iii.

¹⁰¹ Mina Mashayekhi and Taisuke Ito (eds), *Multilateralism and Regionalism: The New Interface* (UNCTAD/DITC/TNCD/2004/7)1-229 cited in Philippe De Lombaerde (ed), *Multilateralism, Regionalism and Bilateralism in Trade and Investment: 2006 World Report on Regional Integration* (Springer 2006) 9 (emphasis added).

¹⁰² For discussion on the competing interests (multilateral and plurilateral) in the regulation of world crude oil production see Melaku G Desta, 'The GATT/WTO System and International Trade in Petroleum: An Overview' (2003) 21 J Energy & Nat Resources L 385. Desta argues that due to the significance of crude oil to the world economy, it has been a perennial challenge finding a balance in the often incompatible interests of producers and consumers of crude oil (386-387). The

stakeholders satisfied has ignored an important internal stakeholder – the oil producing states – required to achieve institutional synergy as envisaged by Mashayekhi and others. Specifically, the oil producing states are constitutionally excluded from ownership and control of oil production in Nigeria, while the MOCs enjoy immense privileges under their Joint Venture Agreements with the FG.¹⁰³ This exclusion of the oil producing states creates an imbalance (i.e. lack of synergy) between the competing interests (internal and external) in Nigeria's oil industry which in turn that has hindered her ability to achieve economic development through her oil wealth.¹⁰⁴

It is further argued that in light of the emergence of new regulatory considerations under the new dispensation of international economic relations, it is necessary to recognize the importance of institutional forms in the international trade-development nexus. Irrespective of the market orientation of international economic relations in the 21st century, there is need for integration and flexibility in the regulatory framework to achieve development through trade. Brenner and Glick support this view, stating that '...institutional forms and more generally political action have shaped the evolution of the capitalist economies.'¹⁰⁵ This view cannot be discountenanced especially in light of the obvious changes in fortunes which have characterised the growth and decline of most world economies in the past century due to switches made in their political and institutional structures. For example, the exponential growth of the Chinese economy in the past 20 years is significantly

incompatibility issues raised by Desta are also inherent within the internal regulatory framework of crude oil producing countries such as Nigeria.

¹⁰³ See Cyril Obi, 'Oil, Environmental Conflict and National Security in Nigeria: Ramifications of the Ecology-Security Nexus for Sub-Regional Peace' (1997) Arms Control and Disarmament and International Security Program (ACDIS) Occasional Paper 9-10 <<https://www.ideals.illinois.edu/bitstream/handle/2142/18/ObiOP.pdf?sequence=>> accessed 13 May 2014.

¹⁰⁴ See generally, Rhuks Ako, 'The Struggle for Resource Control and Violence in the Niger Delta' in Cyril Obi and Siri A Rustad (eds), *Oil and Insurgency in the Niger Delta: Managing the Complex Politics of Petro-Violence* (Zed Books 2011) 46.

¹⁰⁵ R Brenner and M Glick, 'The Regulation Approach: Theory and History' 45. Available online at: http://www.revalvaatio.org/wp/wp-content/uploads/brenner-glick-the_regulation_approach_theory.pdf accessed 11 November 2013. For the significance of institutions in a development-trade context, see Melaku G Desta and Moshe Hirsch, 'African Countries in the World Trading System: International Trade, Domestic Institutions and the Role of International Law' (2012) *Int & Com L Quat* 127, 131-133.

attributable to the fact that China revolutionised her political and economic institutions to effectively maximise her areas of comparative advantage. According to Yong-Nian Zheng¹⁰⁶

...in post- Mao China, the central party-state is no longer monolithic in all aspects of China's foreign affairs. Instead, provincial governments have become increasingly paradiplomatic actors in China's foreign trade. An increasingly important role of provincial governments is to promote rapid growth of foreign trade on the one hand, and constrain the central state's foreign policymaking on the other.¹⁰⁷

These factors are also particularly relevant to the Nigerian scenario because it represents an explanation for the manifestation of anomalies in Nigeria's international economic interactions which cannot be attributed to economic theory alone. It is argued that the constitutional configuration of the institutional forms which drive the economic development of Nigeria via her international economic participation plays a more than negligible role in determining the attainment or otherwise of positive welfare outcomes in Nigeria's international economic forays and therefore needs to be given serious consideration.

In the context of Nigeria, from the NTPD 2002, it is clear that Nigeria is in favour of a trade liberalisation strategy in a bid to actualise its development objectives.¹⁰⁸ It was however argued in chapter four that irrespective of these aspirations to pursue trade liberalisation, there is still a significant disconnect between the institutional provisions of Nigeria's extant trade framework and its development strategy. Afeikhena has linked this disconnect between trade policy and development strategy in Nigeria to the exclusion of the Organised Private Sector (OPS) from the process.¹⁰⁹

¹⁰⁶ Yong-Nian Zheng, 'Perforated Sovereignty: Provincial Dynamism and China's Foreign Trade' (2007) 7(3) *Pacific Rev* 309.

¹⁰⁷ *ibid* 310.

¹⁰⁸ See Briggs (n 97) 4.

¹⁰⁹ Jerome Afeikhena, 'Institutional Framework and the Process of Trade Policy Making in Africa: The Case of Nigeria' (African Economic Research Institutions and Policy Development:

The view in this thesis is that the exclusion of SFGs from the mainstream of international economic interaction is also a reason for the disconnection between the international trade framework and development strategy in Nigeria. For example, it was identified in chapter four, that there is a disconnection between the development strategies of the Federal and State governments under their respective development plans (NEEDS and SEEDS).¹¹⁰ NEEDS and SEEDS were meant to be complementary but were developed within the ambits of a defective constitutional arrangement which does not capture the essence of the changing global economic order. For example, in Anambra state's SEED, it was stated that:

Like most states in the country, Anambra state is heavily dependent on the allocation from the federation account for its revenue. This is slightly augmented by internally generated revenue from taxes, fines and fees, licenses earnings and sales etc. The continued dependence on the federal allocation in Nigeria is structurally inevitable given that the federal government presides over most of the revenue sources in the states.¹¹¹

It is argued that if SFGs remain heavily dependent on revenue allocation from the FG, a majority will not be eager to pursue their potentials considering their Strengths, Opportunities, Weaknesses and Threats (SWOT).¹¹² The situation is compounded by the constitutional exclusion of SFGs from the management of key resources in which they possess comparative advantage in the global economy. This is a handicap to the ability of SFGs to effectively implement their SEED objectives. Conversely, SFGs which have genuinely been committed to their SEED objectives have been faced with the challenges of constitutional barriers while trying to access potential investors and partners.

Opportunities and Challenges, Dakar, January 2005) <http://www.idrc.ca/uploads/user-S/11085711371Institutional_Framework_of_Trade_Policy.pdf> accessed 25 May 2010.

¹¹⁰ See chapter four, section 4.5.1 and 4.7.1.

¹¹¹ The Anambra State Economic Empowerment and Development Strategy (SEEDS) Document (Anambra SEEDS), 15 <http://www.ng.undp.org/documents/SEEDS/Anambra_State.pdf> accessed 11 November 2013.

¹¹² Ayo Adesopo, 'Re-Examining the Failing Inter-Governmental Fiscal Relations and Sustenance of Nigerian Federation: An Empirical Study' (2011) 7(10) ASS 107, 111.

Another example is the exclusion of SFGs from the core policy process pertaining to the diversification of the Nigerian economy. Considering that diversification of the Nigerian economy has been a central strategy of all Nigeria's development plans since independence, it is surprising that SFGs where the potential non-oil export avenues are located are not central to this strategy.¹¹³

To achieve export diversification, the NTPD identifies the agencies of the FG as the key stakeholder required to actualise this particular objective.¹¹⁴ As was pointed out in chapter four, this is an area which necessitates the contribution of the OPS and SFGs.¹¹⁵ This is due to the fact that development is fundamental to the economic strategy of SFGs.¹¹⁶ As such, it is argued that SFGs in Nigeria are becoming active in the international arena mainly because they seek to achieve development objectives for their constituencies. Coupled with the fact that the current dispensation of international economic relations encourages them to access the international scene, it is necessary to formally incorporate them into the mainstream of the international trade-development strategy in Nigeria.

In order to achieve cooperation in this regard, the development strategies of all levels of government must be integrated under a framework which empowers each level of government based on comparative advantage. In essence, the distribution of powers on matters of foreign economic policy should not be static but relative to the strength of each level of government to handle a specific matter. Clearly, there are issues which cannot and should not be handled by the lower levels of government such as defence or matters of national security. However, the FG should not hang on to power in areas which can be effectively developed by a particular state. The argument here is not for the creation of exclusive tracks for each level of government on a specific matter. Instead, the default position of central control should be varied in instances where it is appropriate for SFGs to take the lead and the FG acts as the

¹¹³ Briggs (n 108) 5.

¹¹⁴ See chapter four, section 4.7.2.

¹¹⁵ Briggs (n 113).

¹¹⁶ See Stéphane Paquin and Guy Lachapelle, 'Why do Sub-States and Regions Practice International Relations?' in Guy Lachapelle and Stéphane Paquin (eds), *Mastering Globalisation: New Sub-States' Governance and Strategies* (Routledge 2005) 77-78.

check and balance. For example, port concessioning in Nigeria is a priority to the littoral states yet shipping, ports and cabotage fall under the ELL. As such, SFGs which are interested in this sector and have demonstrated a commitment to developing this sector by facilitating investment and trade in this regard should be allowed to take the lead while the FG acts as the balancing authority. Hocking describes this phenomenon as ‘relocation’. This happens when the opportunities created by externally expanding regionalism coincides with internal regionalism which is driven by comparative advantage.¹¹⁷ Thus, when SFGs are specially equipped to thrive in a particular sector, they should be encouraged to take the lead in the external sphere.¹¹⁸ This will be discussed in more detail in section 6.3.4 which addresses cooperative federalism in the Foreign Direct Investment (FDI) regime in Nigeria.

In summary, the arguments in this section are not focused on the efficacy or otherwise of international trade as a platform for achieving development. The aim in this section has been to establish how SFGs are a missing link in the international trade-development nexus and why they (SFGs) should be incorporated into this relationship. The arguments and suggestions proffered in this section while not presumed to be a solution to all Nigeria’s development problems are a reflection of the importance of the incorporation of SFGs as an important stakeholder in the development process. The government is already moving in the right direction with the development plans in place at each level of government, but there must be synergy and dynamism in the interplay of the development strategies to achieve coherence in this current dispensation of international economic relations. In the next section the implementation of a cooperative federalism model in specific institutions relating to international economic relations will be discussed and analysed.

6.3.2 The National Assembly (NA).

In chapter four, law making was identified as the primary role of the National Assembly (NA) in Nigeria’s international economic framework. In the context of

¹¹⁷ Brian Hocking, ‘Bridging Boundaries: Creating Linkages: Non-Central Governments and Multilayered Policy Environments’ (1996) 11 *WeltTrends* Nr 36, 43.

¹¹⁸ *ibid.*

international trade, the NA is responsible for passing legislation which regulates Nigeria's international trade and commerce.¹¹⁹ In addition to its law-making responsibility, it was also identified that the NA through the Committee on Foreign Affairs (CFA) has oversight functions concerning the Executive's foreign policy powers. The issues covered by the committee include: measures relating to international economic policy, trading with friendly nations, measures to foster commercial intercourse with foreign nations and economic/geographical groupings to safeguard Nigeria's business abroad and international commodity agreements for co-operation.¹²⁰ The NA is a representation of the 36 states and as such is considered as a platform for serving state interests in foreign policy.¹²¹ Gambari supports this position in his examination of the activities of SFGs under the 1979 Constitution (which has similar provisions to the 1999 Constitution on matters of foreign policy). According to him, 'because the Senate [under the 1979 Constitution] was a distinctly federal body with equal representation of each state, the states and their various interests could influence the making and implementation of treaties.'¹²² This is similar to the position expressed by Smiley (1971)¹²³ and Cairns (1978)¹²⁴ about the experience in Germany, Australia and the US. These authors were of the view that federations where the interests of the SFGs are formally incorporated into national policy making by being represented in the upper house of the legislature amounts to 'intrastate federalism' which caters for the participation of SFGs in foreign policy.¹²⁵

Smiley and Cairns argue that the idea of SFGs having an input into national policy - including foreign policy - is given expression under the structure of the legislative

¹¹⁹ See chapter four, 4.5.3.

¹²⁰ Nigerian National Assembly <<http://www.nassnig.org/nass/committees.php?id=25>> accessed 13 May 2014.

¹²¹ Gambari (n 87)117.

¹²² *ibid.*

¹²³ DV Smiley, 'The Structural Problem of Canadian Federalism' (1971) 14(3) *Can Pub Admin* 326, 326-343 cited in Fafard and Leblond (n 79) 13.

¹²⁴ A Cairns, 'From Interstate to Intrastate Federalism in Canada?' (1978) 2(2) *Bull Can Stud* 13, 13-34 cited in Fafard and Leblond (n 123) 13.

¹²⁵ Fafard and Leblond (n 124).

body.¹²⁶ Fafard and Leblond, commenting on the views of Smiley and Cairns, point out that their arguments imply that the representation of SFGs in the national legislative body precludes ‘the need to give them a direct role in negotiation, ratification and implementation of trade and economic treaties because their interests are represented and protected by other means.’¹²⁷ In the context of Nigeria, Gambari (commenting on the then proposed third republic in 1991) held a similar view to the effect that in Nigeria there is no need for a direct role for SFGs in trade negotiation; the federal character principle enshrined in the then 1979, the 1989 (and now in the 1999) Constitutions provided an adequate representation of SFGs in the senate and as a consequence indirect input of SFGs into Nigeria’s foreign policy.¹²⁸

This position expressed by the authors above is debatable, because there are circumstances when there is lack of direct state representation in the legislative house. For example, pursuant to the Seventeenth Amendment to the US Constitution, state governments are no longer directly represented in Congress and this increases the chances that in Congress partisan considerations may trump state or regional concerns.¹²⁹ Even when there is direct state representation in the legislative assembly as is the case in Nigeria, there is still a chance of partisan considerations diluting their interests. For example, Akindele and Oyediran are of the view that an analysis of the participation of the NA in foreign affairs during the second democratic republic in Nigeria (1979 – 1983) ‘shows clearly the existence of a bipartisan approach to major issues of foreign policy among political parties...’¹³⁰

This thesis supports the views of Akindele and Oyediran that the NA in Nigeria is not an adequate representation of SFGs in Nigeria’s foreign policy interactions. There is no indication that the NA during the second republic which they (Akindele and Oyediran) commented on, and even the current fourth democratic republic (since 1999), has reflected a concrete interest of SFGs in Nigeria’s foreign policy

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ Gambari (n 122) 123.

¹²⁹ Fafard and Leblond (n 127) 13.

¹³⁰ Akindele and Oyediran (n 94) 622.

interactions. To support this argument, the terms of reference under which this CFA acts in regard to the interest of SFGs in the international economic process will be examined. This is an issue because the new dispensation of international economic relations has expanded the participation of SFGs beyond the scope of a nationalised legislative approach to international trade and investment interactions.

When the CFA acts in regard to international economic policy, it is not clear whether their representation is premised on their commitment to the SFGs or adherence to the constitutional status quo which does not recognise state participation in foreign relations. If the NA is indeed acting in the interests of their state constituencies, then the NA is an appropriate forum for representing and protecting the interests of SFGs as advocated by Smiley, Cairns, Gambari, Farfard and Leblond. However, from the structure of trade policy formulation in Nigeria, the powers of the NA and its CFA in the trade process is exercised during the passing of legislation and in the form of oversight functions. An oversight function refers to the committees' surveillance responsibilities on the activities of the executive and its federal agencies which are constitutionally empowered to regulate Nigeria's international economic relations. It is arguable that when these powers are exercised by the NA and the CFA, they are done from the perspective of the NA as a part of the FG, rather than as protectors of state interest. If the NA was truly reflective of SFGs interests in the international economic process, part of its terms of reference should reflect that the exercise of its functions is done in view of the need to ensure that the central government's foreign economic policy is conducted in conformity with the interests of SFGs in Nigeria.

An examination of the objectives of the CFA shows that the committee only takes into consideration the protection of Nigerian interests abroad but not the interests at home. For example, Order XVII Rule B 28 (2) (i) of the House Standing Orders, 2007 states that one of the jurisdictions of the committee is to deal with 'measures to foster commercial inter-course with foreign nations and to safeguard Nigerian business interests abroad.'¹³¹ It does not talk about a corresponding mandate to safeguard the interests of Nigerian businesses at home. This is surprising because the committee's jurisdiction takes cognisance of globalisation by providing in 28 (2) (q)

¹³¹ See Nigerian National Assembly <<http://www.nassnig.org/nass2/committees.php?id=69>> accessed 11 November 2013.

that the committee has jurisdiction on matters that aim ‘To sustain the commitment of member states to the broad themes of globalisation, knowledge, technology and North-South relationship.’¹³² It will be recalled from the discussions in section 6.2.1 that one of the developments which has occurred in federal systems such as the US and Canada is that states in these jurisdictions have recognised the dangers which globalisation poses to their interests if adequate protection is not given to them and businesses operating within their constituencies during international trade negotiations. In the US, protection measures for local businesses such as the ‘no greater rights’ concept has been championed by the states through the intergovernmental linkage for cooperation under the IGPAC, the NCSL and the SAA. This level of consciousness about the impact of globalisation is not deducible from the terms of reference of the NA’s CFA. The objectives of the committee do not show a commitment to protecting the interests of SFGs on matters of international economic interaction in this dispensation of international economic relations.

Compared with the Committee on Foreign Affairs (CFA) mandate in Nigeria, the emphasis of their terms explicitly states that they are focused on protecting the interests of Nigerian businesses abroad. It is questionable why this category is omitted. Based on this premise, it is argued that the NA and CFA need to strengthen their objectives to reflect the interests of SFGs in Nigeria’s international economic interactions.

The vibrancy of cooperation measures between both levels of government in Nigeria can be achieved if there is added input from SFGs in addition to the NA. The provisions of s12 (3) of the 1999 Constitution provide a blue print for such a scenario. As was identified in section 6.2.3, the NA’s broad powers are tempered by a very narrow s12 (3) which is meant to act as an added layer of protection for SFGs in regard to treaty ratification. In addition to the recommendations which were made earlier about this point, it is also possible to draw parallels from the US example in this regard. In the US, the National Conference of State Legislatures (NCSL)

¹³² *ibid.*

¹³³provides a platform for the states to influence the international economic process under the current dispensation of international economic relations. The state Houses of Assembly in Nigeria can follow this trend and consequently improve the level of cooperation and the quality of their SFGs input to Nigeria's international economic interaction. The avenue for SFGs to contribute to the ratification of a treaty under s12 (3) should be done in tandem with stronger interaction with the Executive Governors of the constituencies they represent.

6.3.3 Debt Management in Nigeria.

Debt management is one area which has already shown signs of an emerging cooperative linkage between levels of government in Nigeria. Cooperation has been necessitated in this area because sourcing funds from international financiers has become a prominent aspect of SFG engagement in the international arena. SFGs have actively been involved in external borrowing via the domestic capital market and multilateral sources.¹³⁴ In response to this growing trend, the Nigerian Debt Management Office (DMO) was established on the 4th October, 2000 'To centrally coordinate the management of Nigeria's debt, which was hitherto being done by a myriad of establishments in an uncoordinated fashion.'¹³⁵

Some cooperative measures put in place since the establishment of the DMO include the establishment of Debt Management Departments (DMDs) in all the 36 states of the Federation in 2008.¹³⁶ The primary function of the DMDs is to assist the DMO in keeping tabs on the debt profile of public bodies at all levels of government. To carry out its functions, the DMDs are integrated into the mainstream of government business at the state level so that they can keep up-to-date records of debt incurred by each state and ensure that borrowing is in line with the guidelines issued by the

¹³³ NCSL Press Release
<<http://www.ncsl.org/documents/standcomm/sclaborecon/PresidentialTradePromotion.pdf>> accessed 03 June 2014.

¹³⁴ See chapter one, section 1.2.2.

¹³⁵ Debt Management Office (Establishment) Act, 2003 Act No 18
<<http://www.dmo.gov.ng/backgroundb.php>> accessed 03 June 2014.

¹³⁶ Nigerian Debt Management Office (DMO), *Annual Report* (2009).

DMO.¹³⁷ Under the cooperation mechanism, SFGs have been encouraged to participate in the debt management process by passing state legislation which complements the FG's initiative. As at 2009, it was reported that:

In pursuance with [of] the objectives of the development of sub-national debt management, a total number of four states (Bauchi, Bayelsa, Lagos and Nassarawa) have enacted their Public Debt Management Acts, while the rest of the states are in the process of doing same, with the exception of five states (Borno, Jigawa, Kano, Sokoto and Adamawa) which are yet to do so.¹³⁸

To further cooperation efforts amongst the FG and SFGs on debt management, the DMO has since its introduction engaged and collaborated with donor agencies such as the Department for International Development (DFID) to provide assistance to SFGs in the area of sub-national debt management. The FG through the DMO has also been actively engaged with SFGs in the area of the development of sub-national bonds. These bonds are required by SFGs to fund critical economic and social programmes.¹³⁹ The significance of these cooperative measures highlighted above is that they are occurring in a vital sector of the Nigerian economy which plays a crucial role in the trade process under this dispensation of international economic relations.

An improvement on these efforts will be to integrate the DMO initiatives into the trade-development strategy of all the levels of government in Nigeria. This is necessary in view of the fact that the main reason SFGs seek funding is to promote their development agenda.¹⁴⁰ If federal funding and revenue sharing remains the primary focus of Nigerian federalism, SFGs will continually seek external funding to augment the shortfall in finances needed to meet their development objectives.¹⁴¹ However, if the debt management strategy is mainstreamed into the

¹³⁷ *ibid.*

¹³⁸ *ibid* 83.

¹³⁹ *ibid* 84.

¹⁴⁰ Gambari (n 128) 123.

¹⁴¹ See Adesopo (n 112) 111.

development/international trade agenda, it is argued that the focus on external borrowing will be better tailored towards increasing of their external competitiveness in the world economy.

6.3.4 Foreign Direct Investment (FDI) Regime.

Nigeria's FDI regime is another area of Nigeria's international economic relations mechanism which has shown remarkable signs of an emerging cooperative framework. Under the current dispensation of democratic governance which started in 1999, FDI has been designated a priority area for Nigeria's economic development strategy.¹⁴² The Nigerian government since 2010 has refocused Nigeria's trade policy strategy by emphasising the importance of FDI to Nigeria's economy. Among the steps taken to achieve this aim is the re-branding of the Federal Ministry for Trade and Commerce (FMTC); as the ministry is now called the Federal Ministry of Trade and Investment (FMTI). Also, the FG in July, 2013, introduced a 30 -year master plan called the National Integrated Infrastructural Master Plan (NIIMP) which is meant to attract investors into Nigeria.¹⁴³

Irrespective of this evidence of cooperation between the central government and SFGs already existing in the FDI sector, there are still some shortcomings which need to be corrected to strengthen the linkage. For example in March, 2012, the Presidency in a bid to boost FDI revived two previously existing committees to facilitate trade and investment in the country. The Doing Business and Competitiveness Committee and the Committee on Investor-Care were introduced to replace the previously existing Doing Business and Report Monitoring Review Committee and the Committee on Problems of Investors. Both committees had for years gone been in institutional limbo.¹⁴⁴ 'The membership of the two committees is drawn from ministries, extra- ministerial departments and agencies which have

¹⁴² See WTO TPRM Report for Nigeria 2011 WT/TPR/S/247 28 and 30 June 2011 9-12.

¹⁴³ See Ibrahim Shuaibu, 'FG Rolls Out 30-year Master Plan to Attract Foreign Investors' *Thisday Newspaper* (Lagos, 27 July 2013) <<http://www.thisdaylive.com/arts/fg-rolls-out-30-year-master-plan-to-attract-foreign-investors/154616/>> accessed 11 November 2013.

¹⁴⁴ Mustapha Bello, 'The Nigerian Business Environment: Reform Options and Recommendations of the Inter-Ministerial Committees on Doing Business and Competitiveness and Investors Aftercare' <<http://www.nesgroup.org/wp-content/uploads/2012/08/NIPC-Presentation.pdf>> accessed 11 November 2013.

critical roles to play in meeting the objectives for which these committees are reconstituted to achieve.’¹⁴⁵ The mandates of the two committees include monitoring, review and recommendations on how existing policies and legislation governing the act of doing business in Nigeria can be improved.¹⁴⁶ The constitution of the committees is a reflection of the deficiency of the existing linkage between the central and SFGs on international economic policy formulation in Nigeria. This is because the committee’s members are drawn only from agencies of the FG. The exclusion of SFGs from these committees is a clear indication of the lack of consideration being given to the role of SFGs in improving Nigeria’s ease of doing business profile. It is argued that by excluding SFGs from these committees their objectives cannot be realistically achieved. This is because SFGs are now active in shaping the FDI process in Nigeria so it is naïve to expect that any reform to the FDI regime can be done without their input in the process. SFGs are the closest level of regulation to the grassroots where the implementation of any policy and the consequential impact of such implementation will be felt. In November, 2011, the researcher was involved in a Stakeholders’ Meeting organised by the FMTI to brainstorm on a reformation strategy for the FDI regulatory regime in Nigeria. A personal observation made by the researcher was the conspicuous absence of SFG representation at the meeting.¹⁴⁷ It is ironic that the FG does not take cognisance of the importance of SFGs in the reformation process of its FDI regulatory regime, considering that SFGs are the key components of the FDI drive in Nigeria. The importance of SFGs in this regard is an issue which has been recognised by the World Bank. Two reports have been prepared by the World Bank in 2008 and 2010, on the role and ranking of Nigerian SFGs on the ease of doing business. The 2010 Report identified that the FG is not alone in the reformation of regulations to improve the ease of doing business in Nigeria.¹⁴⁸ Thus, if SFGs are involved in reforms, it is important to enhance the synergy between both levels of government to

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

¹⁴⁷ Personal Report, ‘Technical Meeting for the Reformation of Foreign Direct Investment Laws in Nigeria’ (Abuja, 11 November 2011).

¹⁴⁸ The World Bank and the International Finance Corporation, *Doing Business in Nigeria Report* <http://www.doingbusiness.org/~media/FPMKM/Doing%20Business/Documents/Sub-National-Reports/DB10-Sub-Nigeria.pdf> accessed 11 November 2013.

ensure that the reforms from both levels of government are in tandem. An example of the divergence in policy reforms which could arise due to separate efforts for reform is seen in one of the recommendations made by the Doing Business and Competitiveness Committee a year after its inauguration. The Committee identified that the signage fee currently imposed on all businesses by Lagos State Signage and Advertising Agency was one of the constraints affecting the ease of starting a business in Nigeria.¹⁴⁹ It is argued that the existence of such constraints is because there is no policy coordination between the FG and SFGs in the FDI sector.

The exclusion of SFGs from these committees identified above and from the overall FDI process in Nigeria is also an indication of the divergence between theory and reality in Nigeria's overall international economic relations framework. For example in chapter three, it was identified that a new protocol is emerging with regard to how international actors are accessing Nigeria's FDI framework.¹⁵⁰ It is argued that this changing protocol can be conceptualised as a pattern of the central/state cooperative model becoming a reality in Nigeria's international economic relations framework; albeit within the constraints of the extant framework. SFGs are now acting as 'gate keepers' to the Nigerian FDI framework. Hocking calls this 'relocation' and describes it thus:

The phenomenon of relocation is clearly demonstrated as international regionalism and coincides with internal regionalism to produce increasingly complex patterns of relationships and activity. The new geopolitics with its emphasis on access, has come to focus on this in terms of the creation of what Cohen terms 'gateway states' and Ohmae 'region-states'. In fact, these are not necessarily territorial entities with separatist ambitions, but may be regions within nation-states whose characteristics equip them particularly well for, in Cohen's words, 'specialised manufacturing, trade, tourism and financial services functions'.¹⁵¹

¹⁴⁹ M Bello (n 146).

¹⁵⁰ See chapter three, section 3.4.4.

¹⁵¹ Hocking (n 117) 43. See also Paquin and Lachapelle (n 116) 78.

Hocking's conceptualisation of the process is useful in the context of this thesis because he recognises that the phenomenon of 'relocation' occurs due to a link between 'international regionalism' and 'internal regionalism' which produces 'increasingly complex patterns of relationships and activity.'¹⁵² This view reiterates the importance of the link between the new dispensation of international economic relations and the internal configuration within Nigeria as a federal system. His view is also useful to the thesis because he argues that SFGs ('region-state') can act as 'gate-way' states without necessarily having separatist intentions. More importantly, it shows that in this current dispensation of international economic relations emphasis is placed on 'access' and 'special characteristics' (comparative advantage) as the determinants for participation in international interactions rather than on formalist and conventional conceptualisations of sovereignty.¹⁵³ This method can be effectively utilised to frame a cooperative model in Nigeria's FDI regime where 'gate-way' states are given a recognised role as facilitators for Nigeria's FDI drive.

This argument above is supported by Hocking's recommendation for cooperation as a means of effectively managing the complications arising from the new dynamics of international relations. He is of the view that managing the pressures and tensions arising from the dynamics of interactions under a new dispensation of international relations 'requires the establishment of linkage mechanisms capable of providing for each level of government access to resources over which the other has a relative, if not absolute, advantage.'¹⁵⁴ He is realistic in his views that the efficacy of any linkage does not mean the absence of conflicts in relations between national governments and SFGs, but he is of the opinion that 'they are but one point on a spectrum of relationships equally characterized by the need for cooperation.'¹⁵⁵

In summary, the FDI mechanism in Nigeria has shown promise as a potential area of central/state cooperation in Nigeria's international economic framework. The evidence of an emerging trend in this regard has been considered in this section and

¹⁵² *ibid.*

¹⁵³ Daniel Abebe and Aziz Huq, 'Foreign Affairs Federalism: A Revisionist Approach' (2013) 66 (3) *Vand L Rev* 723, 729.

¹⁵⁴ Hocking (n 151) 40.

¹⁵⁵ *ibid.*

the practicality of a building on this cooperative model has also been explored. Considering the importance of FDI to the Nigerian economic objectives, it is imperative that the dynamics of the relationship between SFGs and the central government is given adequate legislative attention. This will ensure that this emerging framework of cooperation in the FDI sector can be nurtured to fully maximize the potentials which FDI provides for Nigeria's economic development objectives, while stemming any abnormalities in its development.

6.3.5 The National Council on Commerce (NCC).

The NCC is a key institution which must be restructured for cooperative federalism to work in Nigeria. In section 6.2.3 of this chapter, an alternate wording for s 12 of the 1999 Constitution was introduced. It was pointed out that for the alternate s 12 to work there must be an accompanying institutional platform to facilitate the proposed cooperation mechanism between stakeholders to Nigeria's international economic process. This is where the NCC comes in.

In chapter four, the key functions of this institution were identified.¹⁵⁶ Specifically, it was identified that at present the NCC is the foremost institution which provides a platform for cooperation between the central government and SFGs on matters of international economic relations. It was also argued in chapter four that the level of priority given the NCC in the international economic process of Nigeria is inadequate. This is because the NCC does not have multilateral and regional trade matters as part of its terms of reference.¹⁵⁷ This view that SFGs contribution to international economic policy formulation under the NCC is of low constitutional priority is also gleaned from the fact that the Enlarged National Focal Point (ENFP) Committee on Multilateralism and Regional Trade Matters; which handles matters relating to multilateral and regional trade matters, is not open to the contribution of SFGs and it is superior in constitutional ranking to the NCC within the Nigerian trade policy formulation hierarchy. The points identified above raise concern and the need to question whether in light of the objectives of the NCC; it is an effective

¹⁵⁶ See chapter four, section 4.5.3.

¹⁵⁷ See chapter four, section 4.7.2.

forum for actualising the contribution of SFGs to the international economic policy formulation in Nigeria.

In Abuja, the 1st and 2nd participants informed the researcher that the NCC is a consultative forum which does not create any binding obligations on the participants. The decisions emanating from the forum are not strictly enforced but members (including SFGs) are encouraged to implement them. In relation to the frequency of the NCC meeting, the 1st participant in the Abuja interviews admitted that the frequency of the meetings is not satisfactory *prima facie*; as regular dialogue is needed to properly integrate SFGs into the trade policy formulation process. However, he is of the view that the meeting can only be held annually because of the vast number of states in Nigeria (36) which makes it logistically difficult to meet more frequently. He added that during the yearly intervals in-between meetings, SFGs are encouraged to meet with stakeholders within their constituencies to gather information and prepare to properly articulate their position at the annual NCC meetings. The 2nd participant also added that the Minister from time to time calls for emergency meetings with stakeholders (including SFGs) during the interval between NCC meetings when there are pressing issues concerning Nigeria's trade policy. The participants at the state levels also reiterated the fact that there are ad hoc meetings which are called if the need arises; although the participant in Lagos stated that it is only the 'high profile' states which are called upon if there are further issues arising after the annual NCC meetings. The interviews provided contradictory evidence as to whether the NCC forum does enable effective participation by SFGs in the Nigerian trade policy formulation process. For example, the policy makers (participants) at the federal level in Abuja claimed that while the system is not perfect, it is representative of a forum which carries all stakeholders (including SFGs) along.

It is argued that the terms of reference for the NCC and the resultant quality of the contributions emanating therefrom are limited showing that it is an informative and reactive process rather than a proactive one.

It is understandable from the description of the status of the NCC that this is what can be expected of such a forum given the circumstances. It is argued that this is not satisfactory in view of the demands of international economic interactions in this current dispensation. The insufficiency of the contribution by SFGs under the NCC

forum to Nigeria's international economic interactions was highlighted by an academic expert interviewed in Edo state. The participant who headed the committee which drafted the NTPD of 2002 was asked by the researcher about the level of participation by SFGs during the preparation of the NTPD in particular and his views about the level of SFGs involvement in trade policy formulation in general. He responded thus: '...there was no contribution from SFGs at the preparatory stage. The NCC only went through the finished draft of the policy.'¹⁵⁸ He added that this is obviously due to the fact that constitutionally SFGs are not responsible for trade policy formulation in Nigeria. He was of the view that this ought not to be so because if Nigeria was practicing true federalism then SFGs would be involved in the formative stage of the drafting of trade policy in Nigeria even if the issue of trade policy is under the ELL. He added that this is important because states are already making forays into the international market to borrow, sign MoU's and partake in other trade investment agreements with sovereign countries; making them important stakeholders in Nigeria's international economic interaction. However as we have seen, participation of SFGs in the formative stage of trade policy is far from guaranteed.

To achieve cooperation in Nigeria's international economic relations framework, the NCC can be restructured to reflect a higher constitutional priority level in Nigeria's international economic relations framework. Although the emphasis of Nigeria's international economic relations strategy is on empowering the OPS, it is imperative that SFGs are constitutionally empowered as well. The reason being that in this dispensation of international economic relations, the facilitation of international economic activities by regulatory bodies at the local level is an important element needed for the OPS to function optimally. For example, a participant in the Edo state interview pointed out that some of the regional interactions which Nigeria is involved in have far reaching implications on trade actors located within SFGs. Thus, if they are involved in the deliberation stages of Nigeria's regional interaction they will be better placed to detect problems at the grassroots, facilitate the proper

¹⁵⁸ Personal Interview with Prof Obadan, Faculty of Social Science, University of Benin, July 2012.

dissemination of information, advice potential exporters and those involved in the export chain.¹⁵⁹

An increase in the frequency of the meetings may be necessary in line with the US, Canada and Belgian examples. It was pointed out in the US experience that the IGPAC has called for more regularly scheduled mechanism for federal-state trade policy consultations in light of the increasing role of states in the US's trade policy interactions.¹⁶⁰ This is also true in the Nigerian context. There is a need to recognize the importance of this forum in Nigeria's international economic relations framework by increasing the frequency of the meetings to keep up with Nigeria's increasing participation in regional and multilateral arrangements and the accompanying activities of her SFGs. The logistical challenges expressed by the participants interviewed should be factored into any review of the meeting frequency.

A suggested solution is that the regular NCC general meeting which encompasses all SFGs and non-state actors should still be held annually. In addition, a rotational committee of states and non-state actors should convene as often as is necessary during the negotiation and implementation process of any agreement initiated by the central government or any SFGs. In this regard, a useful parallel can be drawn from the accession protocol of the WTO for new members. To become a member ("accede to") of the WTO, all WTO members must agree on terms. This is done through the establishment of a working party of WTO members and through a process of negotiations.¹⁶¹ Each accession Working Party takes decisions by consensus. All interested WTO Members must be in agreement that their individual concerns have been met and that outstanding issues have been resolved in the course of their bilateral and multilateral negotiations.¹⁶² In regard to the concept of reaching agreement by consensus, a similar model is found in the Belgian cooperative

¹⁵⁹ See chapter four, section 4.7.2.

¹⁶⁰ Hayes (n 75) 31.

¹⁶¹ Art XII Marrakesh Agreement Establishing the WTO.

¹⁶² See WTO, 'How to become a Member of the WTO' <http://www.wto.org/english/thewto_e/acc_e/acces_e.htm> accessed 03 June 2014.

framework.¹⁶³ The Inter-ministerial Committee on Foreign Policy (ICFP), which is comprised of representatives of different authorities at the highest political and administrative levels, is responsible for ensuring dialogue and avoiding conflicts between the stakeholders.¹⁶⁴ It maintains the linkage (the exchange of information and dialogue) between all parties involved in the decision making process.¹⁶⁵ Decisions are taken by consensus and if consensus is not achieved, Belgium abstains from taking a position on that matter.¹⁶⁶

In the case of the proposed rotational committee of the NCC, the process of negotiations between the stakeholders to the Nigerian international economic process (state and non-state) will be premised on the objective of ensuring that an international economic agreement entered into by the FG aligns with the interests of any stakeholder affected by such an agreement. The rotational committees of the NCC should include all relevant stakeholders (state and non-state) which are affected by a specific treaty. SFGs which are interested in signing agreements with a sovereign nation should also have powers to request the convening of a rotational committee meeting where the FG and any other interested stakeholders (including SFGs) can negotiate the terms of such an agreement.

The requirement for consensus on agreements as is the case with WTO ascension protocol and in Belgium should be optional pursuant to the alternate s12 discussed earlier.¹⁶⁷ The reason why reaching consensus should be optional is because the aim of the proposed rotational committee is not to burden all the interested parties with the details of an agreement or to subject the details of such an agreement to unnecessary bureaucratic red tape. The lead SFG and/or FMTI should be saddled with the responsibility of coordination between all stakeholders. However, the fixing of a reasonable timeframe for entertaining views and objections to a proposed agreement should be the responsibility of the FMTI.

¹⁶³ Paquin (n 80) 187.

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ See section 6.2.3.

With regards to content of the contribution to be made by stakeholders under the proposed cooperative framework, it is important to avoid the Belgian experience where the need for consensus by all stakeholders can often lead to policy stalemates. More so, there is no guarantee that a deeply divided country like Nigeria would not experience the same fate as Belgium. An alternative approach would be to make the contribution to content discretionary. As was stated in the alternate wording of s 12, the emphasis is on creating a legitimate forum where SFGs have an opportunity to contribute to the policy making process. The intention is to dissuade these actors from adopting conflicting policies when they consider themselves to be outside the system.

The format of the contributions to content of a bill could be in the form of opinions, reservations or objections. There is also no guarantee that these contributions would be taken seriously, but the opportunity to be heard has the potential to deepen the democratic process in Nigeria's international economic policy formulation process. This could also strengthen the parliamentary process in Nigeria because contribution to content of a bill rather than waiting for ratification before objection or approval (as it is in the current s 12) would give greater opportunity for SFGs to ensure that their views are adequately reflected in any international agreement that affects their economic development.

In addition to increasing the frequency of the meetings, the terms of reference of the NCC should also be elevated to reflect the Hayes typology identified in section 6.2.1. This should include:

- (1) increased input by SFGs in the negotiations of international economic agreements by the central government, especially under the proposed rotational committees of the NCC;
- (2) Increased involvement of SFGs in the implementation of international economic agreements; and
- (3) A larger role for SFGs in the administration of the trade disciplines implicating regional and local measures.¹⁶⁸

¹⁶⁸ Hayes (n 160).

With reference to the alternate s 12 introduced earlier, these enlarged terms of reference for the NCC can be incorporated into the workings of that section. This can be achieved by building on the debt management and the FDI examples treated previously. From these two examples, it was identified that these sectors of Nigeria's international economic interaction have already been subjected to some degree of intergovernmental cooperation. These examples demonstrate that cooperation is feasible within Nigeria's international economic relations framework. Flowing from this, it is argued that the NCC has the potential to serve as a unifying platform for integrating the cooperation efforts in the various sectors under a central forum for federal/state deliberations. This will serve a similar purpose like the Canadian C-trade Committees, the Inter-ministerial Committee on Foreign Policy (ICFP) in Belgium and the Intergovernmental Policy Advisory Committee (IGPAC) in the US. The NCC can serve as a platform for SFGs to contribute in the area of implementation of trade norms under s12; subject to the broader interpretation given to 'treaty' in the revised section. The NCC can also serve as a platform for SFGs to play a larger role in the administration of the trade disciplines. This can be achieved if the NCC is used as a forum for regular information sharing between the SFGs and the FG about trade negotiations and obligations which affect SFGs.

On the issue of trade negotiation under the extant framework, the Enlarged National Focal Point (ENFP) plays a key role. The ENFP is primarily responsible for policy relating to negotiation on multilateral and regional trade agreements in Nigeria. However, it was pointed out in chapter four that this forum excludes SFGs and is of higher constitutional priority than the NCC. A cooperative perspective to the workings of the ENFP will be addressed in the next section to consider the possibility of an improved collaborative role between the NCC and ENFP.

6.3.6 The Enlarged National Focal Point (ENFP) on Multilateral and Regional Matters

It was identified in chapter four that the exclusion of SFGs from the Enlarged National Focal Point (ENFP) Committees on Multilateralism and Regional Trade Matters is an indication of their low constitutional priority in Nigeria's extant international trade framework. Furthermore, the objectives of the NCC discussed in the previous section iterates the fact that SFGs only contribute to issues relating to

multilateral or regional trade interactions in an advisory capacity. This view is supported by an opinion expressed by the 3rd participant in the Abuja interview who stated that there are two perspectives to be considered in relation to the contribution of SFGs to the trade policy process in Nigeria –formulation and implementation stages. He said that states are restricted to domestic trade issues in the formulation stage while the central government handles the formulation of policies relating to international trade interactions of the country. On the Implementation side, he said that *‘states play a more prominent role at the implementation stage of international trade related issues.’*¹⁶⁹ On the latter view, a reading of the NTPD, 2002 presents a contrary position to the opinion expressed by the participant. Under the NTPD, SFGs are excluded from the implementation plan on almost every point relating to international trade negotiation and implementation.¹⁷⁰

It is argued that this position is unacceptable under the current dispensation of international economic relations. This is because SFGs are vital to the negotiation and implementation process of international trade agreements in this current dispensation. In view of this, it is argued that the recommended solution for lack of cooperation between agencies in Nigeria’s international trade interactions cannot be achieved if one of the important stakeholder groups (SFGs) is excluded as an implementation agency. This position is also supported by parallels which were identified in the US, Canada, Belgium and India examples. The patterns from these federal systems show that international trade negotiation in this dispensation of international economic relations cannot be done in isolation of SFGs which are directly or indirectly affected by the shrinking parameters of globalised international interactions. Thus, direct participation in actual negotiation of international economic agreements may be farfetched in Nigeria at this point in time but contribution from SFGs at the deliberation stage is not out of place.

This is a pragmatic approach in view of the fact that SFGs already have access to the international scene which can lead to a disruption of any international economic

¹⁶⁹ Focus Group Discussion with Mr Bawa Lere Lawal – Deputy Director Trade; Mr Ezikpe Kalu – Assistant Director Trade, Mr Sunday Oghydi – Assistant Director, and Mr Abdul Hamid – Chief Commercial Officer at the Ministry of Trade and Investment Abuja, June 2012.

¹⁷⁰ See chapter four, section 4.7.

obligation to which Nigeria is bound to adhere. Considering that SFGs in Nigeria already have access to the international scene, it is only logical that they should be part of the negotiation process in some capacity so as to ensure that the regulatory regime for international trade in Nigeria achieves the policy objectives outlined in the action plan of the NTPD 2002.

To this end, the recommendations about strengthening the frequency and terms of reference of the NCC have been suggested in the previous section of this chapter. To prevent duplication and overlap of functions, it is suggested that the ENFP should retain its functions as a policy hub for multilateral and regional issues in Nigeria. Based on the ENFP's composition of government officials from the central government as well as private sector stakeholders (including researchers and academics), the committee is a good technocratic forum for ironing out the technical details of Nigeria's international economic interactions. The findings and recommendations of the ENFP should be used to strengthen the negotiation process under the NCC. Instead of requiring the contribution of SFGs under this forum, it (ENFP) should serve as the policy research and development hub of Nigeria's international economic framework. The deliberations of the ENFP would help to strengthen the participation of SFGs in Nigeria's international economic interactions under the auspices of the NCC. The expertise of the ENFP should also be open to SFGs at the initial stages of any proposed international trade negotiation process they wish to set up. This should be done before convening any rotational NCC committee meeting.

6.3.7 The Nigerian Governors Forum (NGF).

The last but not the least important institution which will be considered in this chapter is the NGF. The NGF is a coalition of the elected Governors of the 36 states in Nigeria. It is a non-partisan association which seeks to promote unity, good governance, better understanding and co-operation among SFGs as well as ensuring a healthy and beneficial relationship between SFGs and other tiers of government.¹⁷¹ It was established in 1999 in conformity with the right to freedom of association under s 40 of the 1999 Constitution. It also has legal personality pursuant to its

¹⁷¹ Nigeria Governors Forum <http://nggovernorsforum.com/page_strip/background/> accessed 11 November 2013

registration under Part C of the Companies and Allied Matters Act (CAMA), 1990.¹⁷²

The NGF has made significant strides as a platform for actualising true fiscal federalism in Nigeria. Among other things, the NGF since its inception in 1999 has been responsible for fostering cooperation measures between SFGs, the federal government and international entities. Specifically, in regard to cooperation measures which directly or indirectly affect trade, the NGF is responsible for the following cooperative initiatives:

1. The NGF was instrumental in facilitating the release of excess crude funds (from Paris Club debts) to SFGs in 2008. The funds have been distributed several times since then to augment the income accruable to SFGs for development purposes.
2. Another achievement of the NGF is that in collaboration with the Forum of Federations (an international agency which promotes federalism) and the Federal Ministry of Finance, seminars were organised on fiscal federalism in Nigeria. The first one took place in 2008 and the second in 2009. The seminars sought to place more emphasis on the economic relationship between SFGs and federal levels of government with special emphasis on fiscal federalism.

From these two achievements, the impact of the NGF in this regard is a significant effort in the development of a cooperation mechanism for international economic relations in Nigeria. These actions facilitated by the NGF fall under the category of political pressure similar to the experience in India. This kind of collective political will can be utilised to influence the international economic process in Nigeria. However, there is no evidence that the NGF has acted directly in the area of negotiations for international economic agreements. This is presumably due to the existing mindset which makes revenue sharing a priority over revenue generation in Nigeria.¹⁷³ The NGF has been focused on achieving true fiscal federalism rather than pressing for measures which are beneficial to their ability to maximize their

¹⁷² *ibid.*

¹⁷³ Adesopo (n 141) 111.

economic potential within the current dispensation of international economic relations.

When compared with the US's equivalent of the NGF – the National Governors Association (NGA), it is noticeable that their priorities are different. While the NGF is focused on issues relating to fiscal federalism, the NGA has focused its political attention on obtaining favourable terms for the states in the US's international economic interactions. The NGA adopts measures geared at influencing the international economic direction of the US. Measures such as the Governors' Principles on International Trade Policy have broadly set forth the views of the NGA on the trade agenda in the US in this dispensation of international economic relations.¹⁷⁴ Also, in US-China economic relations, the NGA has established long term relationships with their sub-national counterparts in China.¹⁷⁵ This forum runs alongside the existing relationship between the central governments of both countries. This kind of approach is currently missing under the NGF and it is advocated that such is required and achievable in Nigeria under the auspices of the NGF.

Some other achievements of the NGF in the area of cooperation include:

1. The NGF Secretariat (NGFS) based on the mandate given to it by the National Economic Council (NEC) to develop a State Peer Review Mechanism (SPRM), embarked on an assessment of developed projects in SFGs in early 2009 and 2010. This provided an opportunity for SFGs to showcase their achievements as well as the areas facing challenges. Consequently, the NGFS in collaboration with the UK Department for International Development (DFID) through its State Partnership for Accountability, Responsiveness and Capability (SPARC) programme developed a comprehensive set of

¹⁷⁴ National Governors' Association (1999) 'Governors' principles on international trade' Resolution EDC-11.

¹⁷⁵ See Hou Ruili, 'Sub-National Contacts Deepen China-US Relations' *China Today* (Beijing, 24 May 2011) <http://www.chinatoday.com.cn/ctenglish/se/txt/2011-06/10/content_366273.htm> accessed 11 November 2013.

benchmarks and indicators and adopted a systematic and robust Peer Review process.¹⁷⁶

2. The Secretariat opened up relationships with a number of stakeholders including Development Partners such as the World Bank and the United Nations Development Programme (UNDP).
3. Following the passage of the Fiscal Responsibility and Public Procurement Acts in 2007, the NGF constituted a committee of Attorneys-General of states to examine the bills as a prelude to passing their state equivalent. As a result of the interest of development partners and other stakeholders in the implementation of this bill, a multilateral MoU was signed between the NGFS and Africa Development Bank (AFDB), EU, Canadian International Development Agency (CIDA), Japanese International Corporation (JICA), DFID, United State Agency for International Development (USID), World Bank in collaboration with Federal Ministry of Finance and the Debt Management Office (DMO) to facilitate cooperation with SFGs in the implementation of the bill.
4. The NGF in collaboration with the German Agency for International Cooperation organised a working tour of six Governors to Germany in August 2012 to understudy the economic development policies and best practices in the German federation for the purpose of replicating such commendable practices in their various states.¹⁷⁷

The achievements mentioned above demonstrate the NGF's capacity to promote linkage between SFGs, the central government, the OPS and international organizations. This is a significant development because it demonstrates that the political will of the NGF is potent enough to integrate key stakeholders (nationally and internationally) in the international economic process.

¹⁷⁶ See Chuks Okocha, 'NGF Partners World Bank, DFID on Peer Review Mechanism' *Thisday Newspaper* (Lagos, 03 November 2011) <<http://allafrica.com/stories/201111030694.html>> accessed 11 November 2013.

¹⁷⁷ Nigeria Governors Forum <http://nggovernorsforum.com/page_strip/achievements/> accessed 11 November 2013.

Based on this antecedent, the NGF has the potential to promote horizontal best practices among SGFs through its SPRM.¹⁷⁸ This can be used to maintain quality, standard, control as well as checks and balances among SFGs in their involvement in the international economic process. The capacity of the NGF to promote the interests of SFGs in Nigeria's international economic interactions can be further strengthened if they receive support from the ENFP. This is suggested in view of the recommendations for reforms which have been made in section 6.3.6.

6.4 Conclusion.

The constitutional and institutional provisions which have been treated in this chapter are not exhaustive of all the sectors and issues which directly or indirectly affect Nigeria's interactions in a globalised era of international economic relations.¹⁷⁹ However, the issues which have been discussed constitute an important segment of the multifaceted dimension of international economic interactions in this dispensation. The issues which have been addressed represent a convenient point to start the implementation of a cooperative framework in Nigeria's international economic relations regime.

A summary of the arguments in this chapter include the proposition that a cooperative approach to the interpretation of federal compliance clauses in international trade agreements is necessary and feasible in light of the changing dynamics of international economic relations. The examples of cooperative measures from other federal systems which were identified in this chapter demonstrate the feasibility of actualising a cooperative model to the interpretation of this thorny issue of federal compliance clauses in international economic agreements. More importantly, the approach adopted in these country examples show a strong correlation between the new patterns of international economic relations and the need for stronger cooperation measures between levels of government in a federal system. It also shows how the conventional norm of central exclusivity in international economic relations has been revised in these federal systems; either through

¹⁷⁸ Nigeria Governors Forum <http://nggovernorsforum.com/page_strip/initiatives/> accessed 11 November 2013.

¹⁷⁹ See chapter seven infra for a discussion on the potential for further study.

deliberate affirmative action or as a consequence of political pressure and inevitable changes due to exigencies of international economic interactions in this dispensation.

The emerging patterns of cooperation from these federal systems have been utilised in this chapter as a basis for justifying the need for a cooperative re-interpretation of federal compliance clauses in the specific context of Nigeria's framework for international economic relations. To this end, this chapter has proposed alternative constitutional and institutional patterns which can be infused into the extant framework for Nigeria's international economic interactions in this dispensation. The proposals have emphasised a need to correct the mirage of 'safeguards' for SFGs under s 12 of the 1999 Constitution. The proposals have also proposed a greater role for Nigerian SFGs in international trade negotiation and implementation under restructured constitutional and institutional provisions such as s12 of the 1999 Constitution and the NCC. This chapter has also highlighted the evidence of cooperative patterns in the areas of debt management and FDI to illustrate the practicality of the recommendations made. It has been argued that the emerging cooperative framework in these two sectors still needs strengthening in order to fully maximise the potential for central/state cooperation in these sectors.

Overall, the discussions in this chapter demonstrate that there is need for adopting a new strategy in Nigeria's international economic interactions. It also shows that the means of achieving this new strategy entails a reformation of the existing constitutional and institutional provisions which focus on international economic relations.

Chapter Seven: Findings, Recommendations and Conclusion.

7.1 Introduction.

This thesis set out to investigate the changing patterns of interaction between federal systems and international economic norms. Specifically, this thesis aimed to investigate whether central exclusivity has outlived its usefulness as a viable theory underpinning the international economic interaction of Nigeria in a globalised dispensation of international economic relations. This thesis also sought to appraise the viability of cooperative federalism as a suitable alternative for managing Nigeria's international economic interactions in a globalised era of international economic relations.

In view of these aims above, 7 broad research questions were outlined at the onset of the investigation, these are:

1. What is the nature of the relationship between international economic norms and federal systems?
2. What is the evidence that the international economic system has evolved to accommodate new actors?
3. How are the changing dynamics of international economic norms impacting on the internal configuration (constitutional and institutional) of federal systems?
4. What are the implications of the changing constitutional and institutional competence of federal systems on the theory underpinning their participation in the new dispensation of international economic relations?
5. What factors have shaped the configuration of Nigeria's federal system?
6. How have the peculiarities of Nigeria's federal system impacted on her international economic interactions?
7. How effective is Nigeria's trade regime in view of the changing patterns of international economic interactions?

Nigeria presented an interesting scenario because preliminary observations indicated that, since the start of the 4th democratic republic in 1999 there have been increased

levels of participation by Nigeria's SFGs in the international economic system.¹ This runs contrary to the theory underpinning the extant constitutional and institutional framework in Nigeria, which excludes the participation of SFGs in international relations. More importantly, it was identified in chapter one of this thesis that this emerging trend in the international participation of Nigeria's SFGs is yet to receive adequate coverage in the literature on federalism and international economic relations in Nigeria.² While studies have been conducted about this emerging trend in a number of federal systems in the international system, there is yet to be any substantive investigation which focuses on the Nigerian experience.³ Thus, the choice of Nigeria as a case study was imperative because there is a gap to be filled in the existing federalism and international economic relations literature as it pertains to the changing institutional dynamics of Nigeria's international economic interactions.

At the beginning of the investigation into the Nigerian case study, hypotheses were generated in line with the broader research questions outlined earlier. It was predicted that the thesis would demonstrate:

1. That there is a new dispensation of international economic relations which is characterised by an expansion of international economic norms into areas which were hitherto within the exclusive competence of nation-states.
2. That the expanding scope of international economic norms has both an 'outward' and 'inward' effect on international and domestic regimes.
3. That, on the domestic front, there is a link between evolving international economic norms and the internal constitutional configuration of Nigeria (a

¹ These new interactions by Nigeria's SFGs in the 4th republic are discussed in chapter one, section 1.2.2 and chapter four, section 4.7.2 160-162.

² See chapter one, section 1.2.2 for a discussion on the existing literature which relates to the activities of Nigeria's SFGs in international economic relations.

³ Federal systems such as Canada, US, Argentina, Australia, Austria, Belgium, Germany, India, Malaysia, South Africa, Switzerland, to mention a few have benefitted from extensive studies about the growing participation of their constituent units in foreign affairs. See generally Hans Michelmann (ed), *A Global Dialogue on Federalism: Foreign Relations in Federal Countries*, Vol 5 (McGill-Queen's University Press 2006).

practicing federal state). This link is predicated on the proposition that the 'inward' effect of expanding international economic norms has:

- a. blurred the rigid lines of sovereign demarcation between Nigeria and her international trading partners;
 - b. Fragmented the domestic policy arena for international economic participation in Nigeria by opening up opportunities for her SFGs to access the international scene.
4. That these 'outward' and 'inward' impacts have led to a divergence between theory and functional reality of Nigeria's international economic relations regime.
 5. That cooperative federalism is a more appropriate alternative to central exclusivity for Nigeria's international economic interactions under the current dispensation of expanding international economic norms.

The aim of this final chapter is to discuss the findings of the thesis in relation to the hypotheses outlined above. The discussions will also reinforce the contributions and significance of the thesis to the selected case study in particular and the discourse on the relationship between federal systems and international economic norms in general.

7.2 The Findings.

To test the hypotheses, the themes of the thesis have been developed sequentially over the course of six chapters.

In chapter one, it was established as a foundational premise that the relationship between federal systems and international norms is characterised by compatibility issues due to the divergent values associated with both regimes. It was identified that foreign relations in general are conventionally regarded as an area which necessitates singleness of

purpose, while federalism as a system of government is premised on the concept of shared and/or divided competences among multiple levels of government.⁴

Flowing from this premise, it was argued in chapters two and three that the response of federal systems to these compatibility issues is ‘dispensationally sensitive’ because of the dynamic nature of the federal process.⁵ Building on this argument, it was argued in chapter three that the traditional position in international law which favours plenary powers for central governments in matters of foreign relations is characteristic of a dispensation of international law where nation-state based sovereignty was the primary determinant of international relations.⁶ State sovereignty-based values associated with international economic relations were shown to be present in international trade interactions; as evidenced by the federal compliance clauses found in multilateral and regional trade agreements discussed in chapter two.⁷

It was then argued that the dynamics of the international economic system have deviated from the traditional values associated with the relationship between international law and federal systems. The arguments of this thesis, indicated the significance of geopolitical changes in international relations to the emerging trend of SFGs participating in the international economic system.⁸ It was argued in chapter three of this thesis that in the specific context of international trade norms, globalisation has facilitated the expansion of international economic norms beyond the exclusive domain of central governments in federal systems.⁹

⁴ RA Akindele and Oyeleye Oyediran, ‘Federalism and Foreign Policy in Nigeria’ (1985) 41 Intl J 600, 602.

⁵ See chapter two, section 2.2.1 – 2.2.2.

⁶ Edward T Hayes, ‘Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories’ (2004) 25(1) Nw J Intl L & Bus 1, 20.

⁷ See chapter two, section 2.4 and 2.6.

⁸ See chapter three, section 3.2.

⁹ See chapter three, section 3.2.

In this thesis, the arguments make neither strong claims about the crystallisation of a constitutional order in the international trade process, nor a reversal of the traditionally accepted norms of international law practice, especially as it relates to recognised actors in international law.¹⁰ However, the evidence considered in chapter three was substantial enough to support a hypothesis that the dynamics of the international trade system in contemporary times has led to a shift in emphasis from the WTO to RTAs.¹¹ It was argued that this shift in importance has a significant impact on the institutional participation of federal systems in international economic relations. This is due to changing dynamics between the WTO and RTAs which now encourages the participation of SFGs in aspects of international economic relations which they are excluded from under the WTO.¹²

Also in chapter three, the impact of the expanding scope of international economic regimes on the constitutional/institutional framework of international and domestic regimes was considered. Evidence of outward expansion and inward contraction effects brought about by the impact of a new dispensation of international economic systems on the patterns of interactions internationally and domestically were considered.¹³

On the international front, the transfer of sovereignty from nation-states to international organisations such as the WTO were analysed in chapter two and three as evidence of a shifting emphasis from a nation-state centred practice in the international economic process to a multi-level global one.¹⁴ On the domestic front and in the specific context of federal systems, the thesis relied on previous country studies which have analysed the scope of this contraction effect on the foreign relation activities of SFGs in federal

¹⁰ See chapter three, section 3.3.2.

¹¹ See chapter three, sections 3.3.1 – 3.3.2.

¹² See chapter three, section 3.4.3 and section 3.4.4.

¹³ See chapter three, section 3.2 and 3.4.

¹⁴ See chapter two, section 2.3.2 and chapter three, section 3.2.1.

systems.¹⁵ The thesis utilised scholarship of academics such as Spiro, Goldsmith and Schütze on the experience of the US federal system;¹⁶ the arguments of Paquin, and Bursens and Massart-Pierad about the Belgian federal system;¹⁷ the arguments of Mattoo and Jacob, Sridharan and Jenkins about the Indian federal system;¹⁸ the arguments of Zheng about the experience in China;¹⁹ and also the arguments of Cornago about the Russian scenario.²⁰ These country examples were relied on with varying degrees of emphasis. A common thread running through the discussions about these country experiences is that the participation of SFGs in international economic relations is progressively being factored into the constitutional and/or institutional framework of these countries.

To establish a link between the dynamics of a changing international economic system and Nigeria's constitutional/institutional interactions with this system, the evolution of Nigeria's patterns of interaction with international economic regimes was considered in chapter four.²¹ It was identified that the existing constitutional and institutional framework for international economic relations in Nigeria conforms to the traditional international law norm of 'central exclusivity' in favour of central governments.²² It was demonstrated that Nigeria experienced a shift from shared competence in international economic interactions between the central and SFGs (under the 1960/63 Constitution) to central exclusivity in favour of the federal government under the current dispensation of the 1999 Constitution. It was also argued that the progressive centralisation of Nigeria's

¹⁵ This thesis considered the extensive study on foreign relations in 12 federal systems conducted by the Forum of Federations in 2007. See Michelmann (ed) (n 3).

¹⁶ See chapter five, section 5.3.1; chapter six, section 6.2.1.

¹⁷ See chapter five, section 5.4.2; chapter six, section 6.2.1.

¹⁸ See chapter five, section 5.3.3 – 5.3.4; chapter six, sections 6.2.1, 6.2.4 and 6.3.7.

¹⁹ See chapter five, section 5.3.3.

²⁰ See chapter five, section 5.3.3.

²¹ See chapter four, section 4.2.

²² See chapter four, section 4.2-4.5.

federal system, especially under years of intermittent military rule, contributed to the constitutional exclusion of the SFGs from participating in Nigeria's international economic interactions. This birthed the extant framework under the 1999 Constitution and the NTPD 2002 which do not support the activities of SFG.²³

To critique the extant framework in Nigeria, working criteria were adopted in chapter four. These were based on recommendations developed by international specialist organisations such as the UNDP, OECD and the WTO from which a minimum standard of an ideal international trade and development framework can be inferred.²⁴ The findings of these organisations, which are based on extensive country studies, emphasised the importance of SFGs as stakeholders in an ideal international trade and development policy cycle. Notably, their importance was found to be crucial in the context of developing countries which seek to use international economic engagements as a fulcrum for achieving development objectives. Applying these standards to Nigeria, the extant constitutional and institutional framework in Nigeria was argued to be deficient due to its exclusion of SFGs from the international economic process.²⁵

Based on these deficiencies identified in chapter four, it was argued that the prevailing relationship between the FG and SFGs in Nigeria on matters of international economic relations is not best suited for the current dispensation of globalised trade relations. This is because the centralised framework does not mirror the emerging reality which the new dispensation of international economic relations creates for SFGs to express themselves on the international scene. To substantiate this argument, chapter five was dedicated to appraising central exclusivity and cooperative federalism. The findings in chapter three were used as a spring board to objectively assess the strengths and weaknesses of using either viewpoint as the underpinning theory of international economic relations in federal systems.²⁶ It was concluded in this chapter that central exclusivity is no longer

²³ See chapter four, section 4.7.

²⁴ See chapter four, section 4.6.

²⁵ See chapter four, section 4.7.

²⁶ See chapter five, section 5.4.1 – 5.4.3; see also chapter six, section 6.2.1.

adequate for effectively mainstream the participation of SFGs into the international economic process in federal systems. A summary of the shortcoming of central exclusivity identified in chapter five is that it lacks the necessary flexibility required to fully integrate emerging actors into the evolving international economic process.²⁷ In the context of Nigeria it was argued that central exclusivity's lack of flexibility encourages SFGs in Nigeria to utilise back channels and loopholes in the 1999 Constitution to propagate their international activities. It was argued that this has the potential for breeding subversive and divisive policy actions by SFGs.

From the analysis in chapter five, it was argued that the dynamics of a new dispensation of international relations necessitates an adoption of a cooperative federalism model in Nigeria. Based on the appraisal carried out, it was argued that a cooperative approach to international economic interactions is more appropriate than central exclusivity because it represents a flexible and pragmatic option for mainstreaming the participation of SFGs as institutional participants in Nigeria's international economic relations framework. It was argued that Nigeria's international economic regime needs to incline towards a model of cooperative federalism, where emphasis is on building a vibrant intergovernmental cooperation incorporating the interests of all the stakeholders to the international economic process.²⁸

Cumulatively, the lines of argument can be compressed into a central thesis that the constitutional and institutional framework for Nigeria's international economic participation requires a shift from the conventional norm of central exclusivity to cooperative federalism so as to accommodate SFGs as relevant stakeholders in the new globalised dispensation of international economic relations.

²⁷ See chapter five, section 5.3.4.

²⁸ See chapter five, section 5.4 and chapter six, section 6.2 – 6.4.

7.3 Value of the Findings and Significance of the Research.

Based on the findings discussed above, the contributions of this thesis in the specific context of Nigeria's international economic interactions and the general context of the federalism-international economic relations discourse can be put in proper perspective.

7.3.1 Emphasising the Importance of SFGs in Nigeria's International Economic Interactions.

In chapter four, it was identified that Nigeria's institutional framework for international trade under the Nigerian Trade Policy Document (NTPD) 2002 does not take cognisance of the changing patterns in governance structures which are a distinct characteristic of the current multi-level global economic system.²⁹ Under the current dispensation of international economic relations, governance structures within the nation-state have been fragmented by an expansion in scope of international economic norms. As a consequence, the ability of SFGs to affect foreign economic affairs is on the increase.³⁰ In Nigeria, the NTPD does not support these activities but rather relegates SFGs to the background in most aspects of Nigeria's international trade interaction.

In the context of Nigeria, the arguments in this thesis challenged the extant institutional and constitutional framework which has underpinned Nigeria's economic reformation agenda since 1999. It was identified from an analysis of the relevant laws for international economic relations in Nigeria, that the FG has focused on shifting control of the trade process to the OPS while excluding SFGs.³¹ It was argued in this thesis that this is contrary to the recommendations for an ideal trade framework extrapolated from the studies by international specialist organisations as considered in chapter four. The heavy reliance placed on market forces by the Nigerian government to the detriment of

²⁹ See generally Anne-Marie Slaughter, 'The Real New World Order' (1997) 76 (5) *Foreign Affairs* 183; Jessica Matthews, 'Power Shift' (1997) 76 (1) *Foreign Affairs* 50.

³⁰ Emily Chiang, 'Think Locally, Act Globally? Dormant Federal Common Law Pre-emption of State and Local Activities Affecting Foreign Affairs' (2003) 53 *Syracuse L Rev* 923, 667-71.

³¹ It is on this point that the arguments in this thesis depart from the views of Afeikhena because his focus is on the exclusion of the OPS but also neglects the significance of SFGs as stakeholders in the actualisation of sound international economic policy in Nigeria.

SFGs as stakeholders in the international economic process has been challenged.³² It was argued that this approach by the Nigerian government is not in line with practical realities of the current dispensation of international economic relations. This is because the changing structure of the global economy is not totally market driven, but now encompasses a combination of both private market forces and institutional regulators (state and non-state alike).³³ From this perspective, it was argued in chapter four that the extant framework for trade policy in Nigeria is deficient.³⁴ In summary, it was argued that the international economic relations framework in Nigeria lacks flexibility, coherence, predictability, transparency, accountability and integration.³⁵

Based on these findings above, the arguments of this thesis have sought primarily to fill a gap in the federalism literature which focuses on the interaction between federalism and Nigeria's international economic relations. The consideration of Nigeria's experience is a unique contribution of this thesis because as was identified in chapter one, there is currently a paucity of literature which considers the emerging role of Nigeria's SFGs as stakeholders in Nigeria's international economic interactions.³⁶ It was identified that existing scholarship mainly focuses on the reduction of government regulation in favour of the OPS in the trade process. The arguments in this thesis do not discountenance the importance of the OPS in Nigeria's international economic process, but emphasise the need for understanding the significance of the emerging role of SFGs and the influence of globalisation on the participation of federal systems in international economic relations. The arguments in this thesis build on the views of Briggs and Afeikhena (which advocate stronger contribution of the OPS as stakeholders to Nigeria's international economic process) by recognising that SFGs are important stakeholders,

³² See chapter four, section 4.6-4.7.

³³ In chapter four, it was argued that in an ideal foreign economic policy framework, the role of the institutional regulators (central/ SFGs and non-state actors) is to act as facilitators and stabilisers of the process. See chapter three, section 3.2 and chapter four, section 4.6.

³⁴ See chapter four, section 4.7.

³⁵ *ibid.*

³⁶ See chapter one, section 1.2.2.

which like the OPS are currently marginalised under the extant framework for Nigeria's international economic interactions.

It has been argued in this thesis that the policy thrust of the Nigerian government (which focuses on control of the international economic process by the OPS) is not in line with the strategies adopted by other federal systems faced with similar circumstances.³⁷

Furthermore, emphasis has been placed on the significance of trade as a fulcrum for development in Nigeria.³⁸ This thesis makes a contribution to the literature on development by identifying the deficiency of the trade and development framework in Nigeria. Relying on the framework developed by the OECD and the UNDP, it was identified that SFGs are important actors for actualising development through trade. This is not the position in Nigeria, where SFGs are empowered under the development agenda but excluded from the trade agenda. However, empowerment under both agendas is fundamental for achieving coherence in the trade and development process.

7.3.2 Suggestions on how to restructure the System to Integrate SFGs as Stakeholders in Nigeria's International Economic Process.

This thesis makes a contribution to the policy reforms on Nigeria's international economic interactions by making suggestions on how enhanced cooperation between the FG and SFGs can be achieved. The recommendations outlining a theoretical restructuring of Nigeria's international economic relations framework are timely because of the growing clamour for economic and political self - determination from most quarters of the country. This demonstrates that there is an emerging political opportunity structure which necessitates a rethink of the Nigerian sovereignty on a subject matter – economic development – which is common ground for all stakeholders in the Nigerian federal process.

The reforms advocated in this thesis already have a basis for manifestation in Nigeria through existing soft law mechanisms such as the National Council on Commerce

³⁷ See chapter one, section 1.6.

³⁸ See chapter four, section 4.6; see chapter five, section 5.4.2 'n 181'.

(NCC), the Nigeria Governor's Forum (NGF) and the Debt Management regime. However, the arguments in this thesis are in support of elevated constitutional priority for these existing institutions for cooperation so that the terms of reference of these fora would give the SFGs more opportunities to co-determine Nigeria's policy direction on matters of international economic relations.

It is advocated that attention should also be given to the role of institutions such as the NGF which can promote best practices and ensure that standards are maintained horizontally amongst SFGs and vertically between SFGs and the FG.³⁹ It has been argued that SFGs participation in Nigeria's international economic interaction should be encouraged in relation to regional involvements, especially within the ECOWAS sub-region. It is envisaged that this will stimulate the economic integration drive in the sub-region. With an improved international economic policy capacity for the Nigerian SFGs, there is vast potential in resources (goods and services) which would be better maximised and would invariably flow into the immediate external markets within the ECOWAS sub-region, aiding a deeper integration.⁴⁰ This suggestion builds on the views of Elaigwu who suggested that regional initiatives such as ECOWAS have become essential political tools for coping with the impact of globalisation. As such, he recommended that a 'federally-derived compromise needs to be established in order to manage the tensions between supranational self-determination and national self-determination, which takes cognisance of sub-national demands for self-determination.'⁴¹ This thesis has given expression to this recommendation by advocating for cooperative federalism as a framework for fostering productivity of Nigeria's SFGs in the ECOWAS sub-region while at the same time ensuring that coherence in Nigeria's overall trade strategy is not compromised.

³⁹ See chapter six, section 6.3.7.

⁴⁰ See chapter six, section 6.1.

⁴¹ J Isawa Elaigwu, 'Federalism, Regionalisation and Globalisation Africa' (1998) 1 The Federalist 72 <http://www.thefederalist.eu/site/index.php?option=com_content&view=art&id=219&lang=en&Itemid=27> accessed 26 May 2014.

7.3.3 Significance of the Research to the Discourse on Foreign Affairs Federalism.

The thesis contributes to the literature on foreign affairs federalism by critically appraising the merits and demerits of central exclusivity and cooperative federalism in the conduct of international economic relations.⁴² For example, the importance of uniformity/certainty in international relations as a justification for central exclusivity in foreign economic relations is challenged in this thesis. It was argued that a reliance on this rationale by pro-central exclusivity scholars such as Schafer⁴³ suffers from a deficiency which is that central exclusivity does not give room for variation in the conceptualisation of international economic relations.⁴⁴

This thesis also considered the strengths and weaknesses of cooperative federalism in relation to central exclusivity and other dynamic models of federalism. Relying on the views of Bader⁴⁵ and Schütze,⁴⁶ it was argued that the flexibility inherent in a cooperative model makes it a suitably malleable theory to cater for the changing circumstances of international economic relations in general and international trade in particular.⁴⁷ This thesis also challenged the views of Paquin who from his comparison of cooperative federalism in Canada and Belgium concluded that the model in Belgium was more effective because the SFGs are more formally incorporated in the international economic process.⁴⁸ After a consideration of both models (Canada and Belgium), the

⁴² See chapter five, particularly sections 5.3.3 and 5.4.5.

⁴³ Matthew Schafer 'Federal States in the Broader World' (2001) 27 CAN-US LJ 35.

⁴⁴ See chapter five, section 5.3.3.

⁴⁵ CK Bader, 'A Dynamic Defense of Cooperative Federalism' (2014) 35 Whittier L Rev (Forthcoming) 4 <<http://dx.doi.org/10.2139/ssrn.2189920>> accessed 31 July 2013.

⁴⁶ Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009).

⁴⁷ See chapter five, section 5.4.

⁴⁸ Stéphane Paquin, 'Federalism and Compliance with International Agreements: Belgium and Canada Compared' (2010) 5 Hague J Dip 173. Fafard and Leblond also questioned the effectiveness of the Canadian model. See Patrick Fafard and Patrick Leblond, 'Twenty-First Century Trade Agreements: Challenges for Canadian Federalism' (2012) The Federal Idea <<http://ideefederale.ca/documents/challenges.pdf>> accessed 4 April 2014.

view in this thesis is that the effectiveness of a cooperative mechanism is not solely reliant on how formalised the system is (as is the case in Belgium) but rather on how committed the stakeholders are to the consultation process.⁴⁹ This argument is supported by the views of Massart-Pierad and Bursens who pointed out that despite the existence of detailed constitutional and institutional provisions for cooperation in Belgium; it is a flexible, pragmatic and informal approach which has become the hallmark of Belgian cooperative federalism framework for foreign policy.⁵⁰

7.3.4 Contribution to the Theoretical Understanding of the Linkage between Development and Trade in Federal Systems.

The thesis further contributes to the literature linking development and trade by considering the strategic position which SFGs occupy in federal countries seeking to mainstream trade into their development plans.

Development was identified as a significant factor which influences the international economic interactions of SFGs in Nigeria.⁵¹ From the empirical evidence analysed in this thesis it was argued that forward thinking SFGs in Nigeria engage in international economic activities primarily in a bid to develop their constituencies rather than to project an independent political or cultural persona on the international scene. This is a useful contribution to the federalism and foreign relations discourse, because it supports the position espoused by scholars such as Hocking that the participation of SFGs in foreign relations is not always motivated by separatist objectives.⁵² The examination of the Nigerian experience highlights the relevance of a development agenda as a

⁴⁹ See chapter six, section 6.2.1.

⁵⁰ Francoise Massart-Pierad and Peter Bursens, 'Belgian Federalism and Foreign Relations: Between Cooperation and Pragmatism' in Michelmann (ed) (n 16) 20. The thesis also drew on the views of Akindele and Oyediran (n 4) 602.

⁵¹ Ibrahim A Gambari, 'Federalism and the Management of External Relations in Nigeria: Lessons from the Past and Challenges for the Future' (1990) 21(4) *Publius* 113, 120.

⁵² Brian Hocking, 'Bridging Boundaries: Creating Linkages: Non-Central Governments and Multilayered Policy Environments' (1996) 11 *WeltTrends* Nr 36, 43.

motivating factor behind the foreign interactions of SFGs in a federal system, rather than secession tendencies.

The value placed on the current role of SFGs in Nigeria's international economic process stems from an appreciation that Nigeria's development aspirations, especially via the instrumentality of FDI, is dependent on an integrated policy framework which mainstreams trade into the development agenda.⁵³ It has been argued in this thesis that the exclusion of SFGs from Nigeria's international economic process is inimical to Nigeria's development objectives. Having considered the views from the OECD, UNDP and the WTO, it was demonstrated that Nigeria's current development-trade framework is not in alignment with the recommendations of these institutions which emphasise the importance of integrating all relevant stakeholders into the trade policy cycle.⁵⁴

7.3.5 Contribution to the Theoretical Understanding on the Link between Globalisation and Fragmentation of Governance Structures in Federal Systems.

This thesis examines the significance of globalisation as a facilitator of change in the dynamics of the international economic system. This thesis contributes to the existing literature on globalisation by exploring the extent to which globalisation has reshaped the endogenous constitutional configuration of federal systems in the area of trade. Drawing on the views of authors such as Cass,⁵⁵ Slaughter,⁵⁶ Matthews,⁵⁷ Hayes,⁵⁸ Elaigwu,⁵⁹ Kresl,⁶⁰ Lachapelle and Paquin⁶¹ and Abebe and Huq,⁶² this thesis analysed

⁵³ See chapter six, section 6.3.1.

⁵⁴ See chapter six, section 6.3.1.

⁵⁵ Deborah Z Cass, *The Constitutionalisation of the World trade Organisation: Legitimacy, Democracy, and Community in the International Trading System* (OUP 2005).

⁵⁶ Slaughter (n 30).

⁵⁷ Matthews (n 30).

⁵⁸ Hayes (n 6).

⁵⁹ Elaigwu (n 42). See chapter one, section 1.2.2 for the arguments of Elaigwu on the impact of globalisation on the participation of federal countries in international trade.

the proposition that globalisation has led to a disaggregation of the nation-state and facilitated the emergence of new actors in international relations. This thesis focused specifically on SFGs as one of these new actors. Within the context of Nigeria, this thesis has presented arguments from the Nigerian perspective to support the prior views of these authors mentioned above, that nation-states are no longer the only relevant stakeholders in international economic relations. A significant contribution to the existing literature on globalisation is the argument in this thesis that the Nigerian experience shows how globalisation has aided SFGs in circumventing the constitutional obstacles militating against their participation in international activities. Although the primary focus was on Nigeria's experience in this regard, broader generalisations can be made about the significance of globalisation in the redefinition of the relationship between federal systems and international norms. For example, evidence from Nigeria was used to reinforce the arguments of Hockings that SFGs located in strategic coastal areas have, due to the impact of globalisation, become facilitators of vibrant policies pursued by federal systems in the FDI sphere. It was argued that SFGs have become 'gate-keepers' in the FDI process, by driving the flow of FDI.⁶³ This argument of the thesis has potential for broader application to a federal country like Malaysia which operates a highly centralised federal system like Nigeria and as such SFGs are constitutionally excluded from the foreign policy sphere.⁶⁴ The Nigerian experience demonstrates that in the absence of constitutional inclusion, globalisation is acting as a bridge upon which SFGs can still access the international scene. The implications of this finding is that globalisation has the potential to eventually force constitutional change in centralised federal systems such as Nigeria and Malaysia.

⁶⁰ Peter K Kresl, 'Sub-national governments and regional trade liberalisation in Europe and North America' (1994) 17(2-3) J Eur Integration 309. See chapter three, section 3.2.1 for the arguments of kresl on the impact of globalisation on the activities of SFGs in international trade.

⁶¹ Guy Lachapelle and Stéphane Paquin (eds), *Mastering Globalisation: New Sub-States' Governance and Strategies* (Roultagé 2005).

⁶² Abebe and Huq (n 47).

⁶³ See chapter three, section 3.4.4.

⁶⁴ Francis Kok-Wah Loh, 'Malaysia: Centralised Federalism and Foreign Relations' in Michelmann (ed) (n 54) 30.

7.3.6 Contributions to the Debate on the Constitutionalisation of the International Trade Order.

The findings of this thesis contribute to the existing international trade literature which focuses on arguments for and against the existence of a constitutional order in the international trade system. The findings align with the position that the evidence is not strong enough to suggest the crystallisation of a constitutional order in international trade. However, the existing evidence was used in this thesis to proffer a mid-way position; that the circumstances of international economic relations have changed to accommodate new actors which were erstwhile not recognised in international law.⁶⁵

7.4 Limitations of Findings in the Thesis.

Due to the multidimensional nature of the issues relating to the interaction of international economic norms and federal systems, this thesis is not an exhaustive study of all considerations arising.

A holistic appraisal of the changing dynamics of international economic interactions entails an examination of a broad range of perspectives (international and domestic) and actors (traditional and non – traditional; state and non – state actors; institutionalised and sectorial) which have emerged and are actively contributing to the changing dynamics of the international economic process.

Due to the constraint of time and space, the difficulties in acquiring the relevant required data on the case study Nigeria and word limit restrictions of this thesis; it has not been possible to consider all the relevant perspectives and actors mentioned above. The scope has been restricted to a consideration of the inter-relationship between the international economic regulatory regimes (multilateralism and regionalism in international trade, foreign investment, international finance and competition law etc.) and the constitutional domestic regimes for international economic interactions in federal systems.

⁶⁵ See chapter three, section 3.3.2.

Also, in relation to Nigeria, and with specific regards to the topic under investigation, this thesis was only able to draw on the analysis of commentators who have published articles in journals which are available online. There is the possibility that there are commentaries from authors in Nigeria which are available only in hardcopy which was not accessible for this research.

7.5 A Future Research Agenda.

The research area covered by this thesis has considerable potential for further detailed investigations into the other interconnected strands of the relationship between international economic norms and federal systems. For example, the disaggregation of nation-states (particularly federal systems) in a globalised system of international relations presents a huge potential for comparative discourse because there are over 25 federal and 'regionalised' unitary nation-states in the international system.

It was also identified in the course of this investigation that the literature on federalism and international economic relations cuts across a number of disciplines including political economy and law. This thesis primarily adopted a constitutional approach but took cognisance of the other multidisciplinary perspectives.⁶⁶ However, the research can be expanded to consider these other theoretical perspectives on the relationship between international economic norms and federal systems.

Specifically, it was identified in this thesis that in international economic law, there is an overlap between international trade and international investment. Examples from the FDI regime in Nigeria were utilised to demonstrate the changing dynamics of international economic interactions in Nigeria. This is an aspect of international economic relations which demands a more detailed investigation because FDI is at the heart of current reforms being carried out in Nigeria. Subsequently, the researcher plans to investigate the impact of international investment regimes on the federal process.

⁶⁶ See chapter one, section 1.4.4.

Also, the suggestions for cooperative federalism in Nigeria can be further tested in subsequent investigations if specific sectors of the Nigerian economy are selected for detailed analysis.

7.6 Current Trends in the Nigerian Federal Process.

The empirical evidence presented in the statement of the problem section of chapter one, indicated that a growing trend of Nigerian SFGs accessing the international scene is indicative of the onset of a change in Nigeria's federal process. Three years down the line, this thesis has tracked the unfolding situation in Nigeria through reports and commentaries about the increased activities of SFGs on the international scene.

In 2013, the FG called for a National Conference which commenced in March, 2014. At the time of writing the final chapter of this thesis, the process of political negotiations taking place within the different geo-political regions is strongly hinged on a clamour for a return to the constitutional position of regionalism under the 1963 Constitution. The demands of the major ethnic groups include: 'fiscal federalism, regional autonomy, devolution of powers, resource control...' ⁶⁷

This is a significant development which demonstrates the relevance of the findings of this thesis. It is an interesting development that SFGs are now seeking to use the political process to achieve constitutional change and actualise the practice of true federalism in Nigeria. This signifies the growing level of political consciousness within the polity about the need for sub-national autonomy in the federal process and demonstrates the relevance of this study.

⁶⁷ Simon Ebegbulem, 'National Confab: Regionalism, Fiscal Federalism Top Edo Agenda' *Vanguard Newspaper* (Lagos, 6 March 2014) http://www.vanguardngr.com/2014/03/national-confab-regionalism-fiscal-federalism-top-edo-agenda/?utm_source=dlvr.it&utm_medium=twitter#sthash.h5Q7RkNJ.dpuf accessed 10 March 2014; Clifford Ndujihe and Dapo Akinrefon, 'National Conference: Our Agenda, by Igbo, Yoruba, North, S/South' *Vanguard Newspaper* (Lagos, 23 February 2014) <<http://www.vanguardngr.com/2014/02/national-conference-agenda-igbo-yoruba-north-south/#sthash.c4v92gxI.dpuf>> accessed 10 March 2014; Jimitota Onoyume, 'National Confab: N' Delta Demand Environmental Justice' *Vanguard Newspaper* (Lagos, 03 March 2014) <<http://www.vanguardngr.com/2014/03/national-confab-n-delta-demand-environmental-justice/#sthash.hhpSQr3m.dpuf>> accessed 10 March 2014.

In view of this trend, it is argued that it is only a question of time before the need for reforms in the area of international economic interactions becomes priority on the agenda of the stakeholders to the Nigerian federal process. This prediction is premised on a finding in this thesis that there is a strong correlation between the development agenda of SFGs and their propensity to foray into the international scene. As the experiences of Canada and the US demonstrate, SFGs may not seek radical alterations of international law which still frowns on their involvement in international economic relations, but they will continue to exert pressure and capitalise on opportunities created in this dispensation of the international economic relations. In Canada, Belgium and the US, SFGs have in recent years been able to demand more involvement in the international economic relations. As such, it is believed that if the current democratic dispensation in Nigeria is allowed to evolve organically, the democratic values which are becoming entrenched in the federal process will crystallise in a return to shared competence between the FG and SFGs on matters of international economic relations, as was the case under the 1963 constitution.

In the event that the federal government ignores the need for reform which focuses on stronger cooperative linkages between the centre and SFGs, there is a possibility that the experience in India where the regions are increasingly vocal in resisting and challenging the foreign policy direction of the central government may be replicated in Nigeria.

The recommendations of this thesis can be factored into the reform process which is currently building momentum in Nigeria. This is because the desire for economic autonomy and/or secession coming from some quarters within the Nigerian federation is arguably due to a realisation that they have been constitutionally excluded from determining the policies which affect the utilisation of their resources and the exercise of their right to economic self-determination.

It is argued that if a desire for economic development is at the heart of agitations for constitutional reforms, then cooperative federalism is an option which can prevent the break up of the country. Recent events in the UK demonstrate this point. It is arguable

that the Scottish referendum⁶⁸ was arguably tilted in favour of the ‘Yes Campaign’ because promises were made by Westminster in London to cede more powers on economic and social issues to Scotland.⁶⁹ This demonstrates that economic reasons are increasingly central to political self determination claims in both federal and unitary systems alike. However, this is a slippery slope because in the case of the UK, the Scottish referendum has spurred more economic self determination claims within the union.⁷⁰ This raises questions as to the extent of devolution which can be accommodated without leading to an eventual breakup.

In the context of Nigeria, it is arguable that the prescriptions for cooperative federalism in international economic relations of the country cannot guarantee the continued existence of Nigeria, but it is an approach which is necessary to accommodate the agitations which are building momentum. In essence, it is wiser for a workable constitutional formula to be engineered to reflect a compromise which can lead to the attainment of the common goal of economic development for all stakeholders involved through the instrumentality of international economic relations.

Referring back to the UK example, it is arguable that the Scottish referendum has opened up more clamours for devolution and as such cooperative federalism may have the same effect in Nigeria. This is true to an extent because there are other deep seated issues aside from economic development which are threatening the continued existence of Nigeria. As such, it is possible that cooperative federalism may open up more clamours for self determination. However, the Nigerian union is only sustainable if the system is allowed to develop organically. Thus, if cooperative federalism opens up a ‘can of worms’ relating to other foundational issues (aside from economic development) upon

⁶⁸ The Scottish independence referendum took place on the 18th of September, 2014. The ‘Yes Campaign’ won by a 10.6-point margin against ending the 307-year-old union with England and Wales.

⁶⁹ See ‘Scotland Votes No: PM Promises New Powers’ (Sky News) < <http://news.sky.com/story/1338424/scotland-votes-no-pm-promises-new-powers> > accessed 5 November 2014.

⁷⁰ See Tim Donavan, ‘Devolution battle beckons between London and Manchester’ (*BBC News*) < <http://www.bbc.co.uk/news/uk-england-london-29884237> > accessed 5 November 2014.

which Nigeria exists as a state, then this would be a welcome development which is long overdue.

Also, a move in the direction of cooperation can spur on development for SFGs in Nigeria in areas of great economic potential which have been ignored, underutilised or have stagnated. These SFGs have for a long time settled into a constitutional arrangement where receiving revenue to which they have not contributed was the order of the day.

It is the view in this thesis that this type of reform is realisable in Nigeria now, not just because the polity is ripe for a redefinition of her constitutional and institutional framework for international economic relations but also because the evolution in the world economy (exemplified by the evolving relationship between multilateralism and regionalism in international trade) has created a complex but conducive stage whereby the international economic relations favour any country which can strategically place itself (through its policy choices), to exploit the opportunities for economic growth in a globalised world.

Other federal systems have embraced cooperative federalism with varying degrees of success at achieving the right balance to accommodate centripetal and centrifugal forces. That Nigeria is lagging behind was clearly evident in the attitude of the policy makers interviewed during the field trip to Nigeria in June 2012. They were clearly amused by suggestions that there is a role to be played by SFGs in Nigeria's international trade process.

7.7 Conclusion.

The thesis has engaged with the perennial issues relating to the interaction between federal systems and international economic norms. However, the emphasis in this investigation has been on the need for reform to the theoretical underpinnings of this relationship due to the changing dynamics of international economic relations. This thesis has focused on Nigeria as a case study to demonstrate how the continued reliance on central exclusivity in favour of central governments in federal systems is no longer

viable because it creates a divergence between theory and the functional reality of the current dispensation of international economic interactions. Schütze captures these changing dynamics and the necessity for a shift thus:

The relationship between a society and its constitutional law may, then, at times follow the relation between ‘existence’ and ‘essence’: the former precedes the latter. Social changes precede constitutional ones. These are moments when constitutionalism... ..fails to explain or justify the existing social order...⁷¹

A crucial point is that the emergence of SFGs and other non-state actors as stakeholders in Nigeria’s international economic process is a political-economic change which has preceded a constitutional one. It should not be resisted because of a dogmatic insistence on values of state-centred sovereignty which are impracticable to reconcile in contemporary international relations. Rather cooperative federalism, which is a more pragmatic framework attuned to the demands of a new dispensation of expanding international economic norms, because of its flexibility should be embraced in Nigeria. Cooperative federalism is flexible and dynamic enough to integrate the contributions of SFGs either within a hard law framework as is the case in Belgium, or a soft law framework as is the case in countries like the US and Canada.

As such Nigeria’s international economic relations framework (constitutional and institutional) can be re-configured to accommodate the input of its SFGs within a cooperative framework which is situated half way between a hard and soft law setup.

⁷¹ Schütze (n 50) 1.

APPENDIX

Sample of Interview Questions

1. Under what forums do states contribute to trade policy formulation in Nigeria?

The National Council on Commerce (NCC)

2. What is the legal status of this forum (NCC) and the decisions which emanate from this forum? Is it binding or advisory?
3. Considering the fact that the NCC meets only once a year, do you think this is a sufficient reflection of the participation of states in the trade policy formulation process in Nigeria?

The Enlarged National Focal Point (ENFP) Committees on Multilateralism and Regional Trade Matters

4. Do states participate under this forum?
5. If they do, what is the scope of their contribution?
6. What is the legal status of the forum and the decisions which emanate from the forum?
7. In the Trade Policy document of 2002, under the section: **‘the responsibilities of the public and private sectors’** The role of the states is stated as: the maintenance of trade extension services, the promotion of primary production of all items of export oriented products, the training of manpower for trade growth and development, the investment in infrastructure to facilitate trade etc. However, **the implementation strategy/action plan** of the Nigerian Trade

Policy Document does not provide for any designated role for state governments to play in the trade policy implementation process. Why is this so?

8. Considering the insistent clamours for a rethink of the Nigerian federalism due to the perceived anomalies and lopsided tilt of powers in favour of the central government, do you think that a call for more constitutionally guaranteed powers for states is workable in the trade policy formulation process of Nigeria?
9. To what extent have states contributed in practice?
10. Considering the present focus on re – organising the Nigerian trade policy agenda, with a keen emphasis on the growth of her FDI profile as a means of achieving economic development, do you think a centralised policy formulation system or a decentralised policy formulation system is best suited for Nigeria to improve her Foreign Direct Investment profile?
11. Considering the growing complexity within the international trade regulatory environment – with the current tussle for prominence between multilateralism and regionalism, do you think that a centralised or a decentralised policy formulation structure is best suited to help Nigeria effectively achieve improved and meaningful participation in international trade?
12. Which route do you think best favours Nigeria in her bid to improve her economic fortunes through international trade participation, multilateralism or regionalism?

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